89-512

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

BARNEY J. TEARNEY **Petitioner,**

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, and NATIONAL TRANSPORTATION SAFETY BOARD, **Respondents.**

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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55 pp

QUESTIONS PRESENTED

1. Do *Chenery II* and *Bell Aerospace* provide a regulatory agency like the Federal Aviation Administration (FAA) with the unlimited choice of making or amending air-safety rules either by adjudication or by Administrative Procedure Act (APA) public notice and comment procedures, as the Fifth Circuit has held here, or is this judicially created exception to APA rulemaking requirements limited to the narrow situation where an agency is interpreting broad mandates in its charter and applying them to specific fact situations, as exemplified in District of Columbia Circuit decisions and other circuits?

2. In the face of the constitutional prohibition that Congress may not delegate to the executive branch its *Art. 1, § 1* legislative power to create benefits or penalties, and the APA § 9 mandate (which codifies it) that any such delegation must

be in plain language, is the term "public interest," without more, sufficiently definite to support a claim by the Federal Aviation Administration that it may suspend or revoke pilots' licenses as a penalty for safety violations?

3. Does the FAA's claim that it has authority to order suspension or revocation of a pilot's license as punishment for the violation of a safety rule, affording only administrative trial--rather than using the statutory civil-penalty-jury-trial system of justice--which claim is based upon a loose interpretation of the term "public interest," violate the letter and spirit of the APA because the agency has failed to promulgate this separate system of justice through APA public notice and comment procedures, even failed to publish its interpretation in the *Federal Register*?

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PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Barney J. Tearney respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding April 4, 1989, order denying Rehearing and Rehearing En Banc entered May 12, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 868 F.2d 1451, and reprinted in the appendix. (a-39)

The Opinion and Order of the National Transportation Safety Board (NTSB), not yet reported, is reprinted in the appendix (a-22), as is the administrative law judge's (ALJ) oral initial decision, which it affirmed. (a-5)

JURISDICTION

The Federal Aviation Administration initiated an enforcement action against petitioner under 49 U.S.C. app. § 1429(a) by first serving him with a Notice of Proposed

Certificate Action dated February 26, 1986, then by serving him with an Order of Suspension dated July 9, 1986 (a-1) which ordered a 7-day suspension of his Air Transport Pilot license as punishment for an alleged safety violation. Under § 1429(a), he appealed to the NTSB and hearing was held by the ALJ on January 30, 1987, who affirmed the suspension, with the final Board order, also affirming, entered June 17, 1988.

Capt. Tearney petitioned the Court of Appeals for the Fifth Circuit for review under 49 U.S.C. § 1486. That court entered a judgment and opinion affirming the NTSB order on April 4, 1989; an order denying a petition for rehearing and rehearing enbanc was entered May 12, 1989. Order A-8 extending time for filing a petition for a writ of certiorari, dated July 11, 1989, was signed by Associate Justice Byron R. White.

The jurisdiction of this Court to review

the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes and regulations directly relevant to the issues are here listed, with the pertinent portions of their text set forth in the appendix:

Administrative Procedure Act, 5 U.S.C. §§ 551-559, 702-706 (1982): §§ 551(4), 552(a)(1), 553, 558, 706.

Federal Aviation Act of 1958, as amended, 49 U.S.C. app. §§ 1301-1552 (1982): §§ 1348, 1421, 1429(a), 1471(a)(1) & (2), 1473(a) & (b)(1), and § 1903(a)(9) (NTSB).

Federal Aviation Regulations, 14 C.F.R. Parts 1-199 (1989): §§ 13.19, 91.9, 121.-311, 121.542, 121.589.

Dept. of Commerce, Air Commerce Regulations, §§ 74 (1926). Civil Air Regulations, 14 C.F.R. §§ 20.371 & 20.37110 (1938).

STATEMENT OF THE CASE

Background -- During the period 1971 to

1983, Southwest Airlines (SWA), based in Dallas, Texas, carried 56,000,000 passengers. During that time, to effect more efficient utilization of its (now $25 million per copy) aircraft, its practice was to pushback from the gate with a tug, start engines and slowly pull away, although a few persons might still be standing for a few moments while locating carryon luggage in the overhead, putting a raincoat away, etc. (Exh. F, a-99)

Not only did Southwest never have an incident or injury to any passenger, there is no evidence that any such event has ever occurred on any other carrier, some of whom also engaged in the same practice. (Exh. F, a-99)

In January 1983 the FAA Principal Operating Inspector for SWA wrote to its president and told him that the agency considered the practice unsafe. He cited no Federal Aviation Regulation (FAR) as being

violated. (Exh. D, a-94) The company demurred. Then during late 1984 or early 1985 the FAA Southwest Region[1] initiated enforcement actions against several SWA pilots for taxiing with one or more passengers still standing. (Exh. I, a-105)

This was a ploy to pressure the company into changing its policy. It did. But only by posting an informal memorandum telling its pilots that the FAA was going to treat taxiing with passengers standing as a *per se* violation of its "careless or reckless" rule. (Exh. H, a-104) With that, Southwest regional counsel dropped all the pending violation actions. (Exh. I, a-105)

The Administrator, himself, also wrote to the company president, but neglected to cite any regulation as being violated. (Exh. E, a-96) In response to the presi-

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[1] FAA has nine U.S. regions: Alaskan, Central, Eastern, Great Lakes, New England, Northwest Mountain, Southern, Southwest, Western-Pacific.

dent's answer (Exh. F, a-99), the Administrator assured him that he was "taking all appropriate measures to standardize agency action." (Exh. G, a-102)

Over the next two years FAA officials received complaints in some ten additional cases from individuals who evidently believed there was some rule against it. This apparently convinced these officials that the company memorandum was not doing the job. So they again brought pressure--by now, May 1987--to formally change its flight operations manual. The company acquiesced and did so.

The pressure FAA officials used was this: They took case number ten, which they had not yet initiated as an enforcement action, by now four months after the alleged incident, and the second case against petitioner (*Tearney II*)[2], and on May 18,

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[2] It was later dropped for lack of evidence, after the complaining witness was deposed.

1987, issued an emergency order revoking his Air Transport Pilot (ATP) license.[3] (Exh. A, a-82)[4]

As compelling evidence that this was just a ploy, on May 21, just three days later, these same officials withdrew the emergency order (Exh. B, a-87) and proposed in its stead a 180-day suspension.[5] (Exh. C, a-90)

Issues -- The issues petitioner raises are strictly legal:[6] (1) The safety "rule"

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[3] It was well-known at SWA that the Director of the Southwest Region called the president and threatened that, unless SWA changed its flight operations manual, everytime the FAA got a taxiing complaint they would immediately issue an emergency revocation order against the captain. Aside from the impact on the individual, this of course causes any airline serious inconvenience.

[4] This order allowed him to exercise commercial privileges, which meant he could fly as first-officer for one year, a significant wage loss, and then would have to retake the ATP written exam and a flight test in a Boeing 737, at a cost of thousands of dollars.

[5] Since this order did not leave him commercial privileges so that he could fly right seat, it threatened Capt. Tearney with a wage-loss of $50,000.

[6] Capt. Tearney adamantly denied the charge. Of more than a dozen cases, to our best knowledge, only

(continued...)

he was charged with violating, as required by the Administrative Procedure Act (APA), has neither been published in the *Federal Register* nor, as a substantive policy, promulgated through public notice and comment procedures so that it may be found in the *Code of Federal Regulations*. These failures bar this action.

(2) The FAA claims that § 609 of the Federal Aviation Act of 1958, as amended (FA Act), authorizes it to suspend or revoke a certificate anytime its officials deem it to be in the "public interest." No language in that act so much as hints that suspensions or revocations may be used as a penalty. On its face, the agency's claim, means that it has created license penalties itself. Consequently, regardless of what Congress may have intended (there is ab-

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[6](...continued)
one captain admitted he'd knowingly started to taxi with a passenger still standing.

solutely no evidence it ever intended to grant such wide open power), this claim violates the constitutional prohibition that Congress may not delegate its legislative authority to create benefits or penalties. It also violates Section Nine of the APA, which codifies that principle and mandates that no penalty may be imposed by an agency unless specifically spelled out by its basic charter.

(3) Even assuming, *arguendo*, it to be valid, this claim of authority, constitutes a statement of general policy and/or an interpretation of § 609 of general applicability formulated and adopted by the agency. As required by the APA, the policy has neither been published in the *Federal Register*, nor promulgated through public notice and comment procedures as a substantive matter so that it may be found in the *Code of Federal Regulations*. These failures bar this action.

The great mystery is why FAA officials did not simply amend their air-carrier rule, one that directs that all persons on board should be in their seats with belt fastened during takeoff and landing, to include taxi. The answer, unquestionably, is that they wanted to avoid the hassle of APA rulemaking, and were sensitive to their lack of supporting evidence.

REASONS FOR GRANTING THE WRIT

Exceptional Importance

I. Making airsafety rules--rules of the road--by adjudicating that it is proper for the FAA to announce the new policy by letter to an individual airline assails the letter and spirit of the Administrative Procedure Act. In ratifying such a procedure, the Fifth Circuit has strained the rationale laid down in the landmark cases of *Chenery II* and *Bell Aerospace* beyond the breaking point: It has squarely held that the FAA in making airsafety rules has the

unfettered option of doing so either by adjudication, or by following APA public notice and comment procedures. Put another way, in any rulemaking situation, the agency may decline to follow APA procedures.

Petitioner does not question the holdings in *Chenery II* and *Bell*, but suggests that if they are so easily misunderstood, with such drastic consequences as depriving a citizen of his right to earn a living, and serious implications for airsafety in general, the time is ripe for the Court to redefine in plain language the exception to APA rulemaking they carve out and instruct that it should be very narrowly construed, indeed.

II. About one million citizens, pilots, mechanics, flight engineers, air-taxi operators, repair stations and air carriers hold certificates issued by the FAA. Perhaps 250,000 of them, or more, rely on their license for their livelihood, and

several hundreds of thousands owe their employment to an operator's right to do business.

Annually, at least two to three thousand airmen, mostly pilots, but a growing number of small operators, have their licenses suspended for periods of up to one year, or wiped out by revocation.

To have the FAA put people out of work, ruin careers, cause enormous hardship, by imposing suspensions and revocations as penalties, based solely on the claim that it may do whatever its officials deem to be in the public interest, is anomalous. The more so, when on its face this violates the fundamental constitutional principle that Congress may not delegate its legislative power to create benefits or penalties, which Congress itself saw fit to codify in plain language in the APA, so there'd be no mistake about it.

III. It is probably the greatest open

secret in government: No statute or rule so much as hints that the FAA may impose suspension or revocation of a license as punishment for the violation of a safety rule, and substitute a one-man administrative hearing for the statutory right to trial by jury. Nothing, not even a statement of policy published in the *Federal Register*.

I. FAA failure to publish or promulgate taxi-standing rule violates APA and requires dismissal.

The holding below is unequivocal. After acknowledging that the FAA only recently promulgated "through formal rulemaking a regulation concerning carry-on luggage . . .",[7] the Fifth Circuit said:

> That the FAA could have promulgated its taxiing rule through formal rulemaking does not mean that it should have done so. The FAA has broad discretion to proceed via formal rulemaking or on a case-by-case basis when it addresses safety concerns. As we held in *Miranda v. National Transportation Safety Boa-*

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[7] 14 C.F.R. § 121.589; *See* 52 Fed.Reg. 21476 (1987). This rule, *inter alia*, prohibits closing the boarding door until all carryon luggage has been properly stowed.

rd,[8] in choosing the latter method it committed no error.

Tearney v. NTSB, 868 F.2d 1451, 1453 (5th Cir. 1989) (emphasis added) ([redacted]).[9] It cites *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (*Chenery II*), saying it "unequivocally stated that an"

> agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.

868 F.2d at 1453 (emphasis added) ([redacted]). It cites *NLRB v. Bell Aerospace Co.*, 416

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[8] 866 F.2d 805 (5th Cir. 1989).

[9] Many cases use "informal" which, as we understand it, means that notice and comment procedures were followed but that no public evidentiary hearing was held during rulemaking. This is somewhat confusing, as even without a hearing--which are almost nonexistent at the FAA--formal public notice and comment procedures must be followed. *See* 5 U.S.C. § 553.

It would seem better practice to use "informal" to describe "rules" that have not been put through any rulemaking procedures, and "formal" for those that have.

U.S. 267, 294 (1974), as reaffirming *Chenery II* and restating the principle that an agency "is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." 868 F.2d at 1453 ([redacted]).

We should note that neither the FAA nor the Fifth Circuit disputes the obvious, that the taxi-standing policy constitutes a "statement of general policy" or "interpretation of general applicability formulated and adopted by the agency," or an amendment to a policy or rule, within the meaning of the APA, 5 U.S.C. § 552(a)(1), which would otherwise require publication in the *Federal Register*; or that it is a "substantive" matter within the meaning of *id.* § 553, which would otherwise require promulgation through formal public notice and comment procedures. Nor does the agency

claim that either of these requirements has been met.

We would also assert that it strains logic to hold that it is proper for an agency to formally promulgate a rule that tells the flight crew not to close the boarding door till they are certain all carryon luggage is properly stowed, but that it need not do that for a "rule" that tells them not to taxi until all passengers are seated.

Thus the single issue presented in this section is whether under the teaching of *Chenery II-Bell Aerospace* the FAA has the choice indicated.

A. Chenery II *and* Bell Aerospace *case-by-case adjudication* not applicable.

What the Fifth Circuit has done is lift out of context a seemingly broad general statement of principle, but which in fact is one that applies only in very narrow,

restrictive circumstances.[10] It misapprehends what is meant by "statutory standards," or new "principles." *Chenery II* involved a complex public-utility-securities-law issue, resolution of which depended upon an interpretation of the Securities Act. There was no broad exception to rulemaking intended there. "The function of filling in the interstices of the [Securities] Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future." 332 U.S. at 202-203.

Nothing in the instant case involves the FAA's basic charter, simply the Administrator's duty to make airsafety rules. *See* FA Act, § 307, 49 U.S.C. § 1348(c). The taxi-standing rule was clearly one "to be app-

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[10] We confess to serious reservations about the use of *Chenery II* as the *touchstone* for a line of cases in which exceptions are carved out of major provisions of the Administrative Procedure Act which, enacted in 1946, 60 Stat. 237, was not a factor in that decision.

lied in the future."

Bell Aerospace provides the clearest example. The issue was whether "buyers" were employees under the labor laws who could organize a collective bargaining unit, or were they such a part of management as to be prohibited from so doing. And if the Court found that they were, whether the NLRB had to invoke its rulemaking procedures to say so. 267 U.S. at 291-292. Again, an interpretaton of basic law. *See also, Chisholm v. F.C.C.*, 538 F.2d 349, 364 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976) ("[W]e are in no position to say that the Commission has misinterpreted Congress' intent or usurped its authority.").

This Court stressed in *Bell*, "Nor are fines or damages involved here." *Id.* at 296 (emphasis added). The 7-day suspension ordered was imposed as punishment for the alleged violation, as an alternative penalty to a civil money fine. Compliance and

Enforcement Program, FAA Order 2150.3, ¶ 205, at pages 13-15 (1980) (a-75). The court below overlooked this.

It also failed to deal with the fact that there was already a rule extant which governs: "During the takeoff and landing of an airplane, each person on board shall occupy an approved seat or berth with a separate safety belt properly secured about him." 14 C.F.R. § 121.311(b). The taxi-standing policy plainly amends this by expanding the portion of flight in which passengers must be in their seats. There is no brief in *Chenery II* or *Bell* to amend an existing rule through adjudication.

The Board's approval, and thus the Fifth Circuit's, of FAA's claim that "the regulations cannot contain a complete list of every prohibited act," Board Opinion and Order at 8 (a-35), overlooks reality, the agency's rules do just that: The FARs tell cockpit crews that during any "critical

phase of flight" they may not call in and order "galley supplies," confirm "passenger connections," make announcements "promoting the air carrier or pointing out sights of interest," fill out "company payroll and related records." 14 CFR § 121.542(a). The crew is further advised not to engage in any activity that would be distracting, such as, "eating meals," "nonessential conversations," "reading publications." *Id.* § 121.542(b). "For the purposes of this section, critical phases of flight includes all ground operations involving taxi, take-off and landing, and all other flight operations conduct below 10,000 feet, except cruise flight. NOTE: Taxi is defined as 'movement of an airplane under its own power on the surface of an airport.'" *Id.* § 121.542(c). *See also id.* §§ 121.543, 121.-545, 121.547, 121.548, and 121.549.[11]

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[11] Interestingly, the FAA promulgated an internal memorandum which covered the taxi-standing (continued...)

Frankly, we do not understand what relevance "foreseeability," 868 F.2d at 1453 ([redacted]), has to do with a rule-of-the-road.

Sustaining a procedural challenge to an agency policy, the District of Columbia Circuit pointed out that "The APA establishes procedural requirements for rulemaking precisely because they are presumed to elicit responses which, when given the requisite consideration by the agency, may affect its decision. Here the opportunity for such an effect has never been accorded." *Simmons v. I.C.C.*, 757 F.2d 296, 300 (D.C. Cir. 1985); *see also New England Tel. & Tel. Co. v. F.C.C.*, 826 F.2d 1101, 1110 (D.C. Cir. 1987) ("First, a departure from prior policy cannot stand when the agency fails to explain the reason for the change.")

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[11](...continued)
policy. *See* FAA Action Notice, A-8430.6, Oct. 31, 1986 (Exh.J, a-107).

A Boeing 737 captain can see most of the cabin. But not all. What do 747 captains do? Are not the airlines entitled to know the practical basis for the rule?

B. FA Act and FAA directives mandate that airsafety rules be promulgated through APA public notice and comment procedures.

Even assuming, *arguendo*, that case-by-case adjudication for making airsafety rules would otherwise apply, both Congress and the FAA itself have mandated that such rules be made only by means of APA public notice and comment procedures.

The NTSB has no air-safety rulemaking powers, adjudication or otherwise. Its only mandate vis-a-vis FAA is to act as a quasi-judicial panel and "review on appeal (A) the suspension, amendment, modification, revocation, or denial of any operating certificate or license issued by the [A-dministrator] under sections 1422, 1429, or 1431(c) of this title and the revocation of any certificate of registration under sec-

tion 1401(e)(2) of this title . . ." 49 U.S.C. § 1903(a)(9); *see also, id.* § 1429-(a).

Safety rules are solely the FAA's responsibility: "The [Administrator] is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft . . ." 49 U.S.C. § 1348(c) (FA Act § 307(c)) (emphasis added), as well as "[s]uch reasonable rules and regulations . . . as [he] may find necessary to provide adequately for . . . safety in air commerce." *Id.* § 1421(a)(6) (FA Act § 601).

Section 307 also provides: "**In the exercise of the rulemaking authority under subsections (a) and (c) of this section, the [Administrator] shall be subject to the provisions of the Administrative Procedure Act** . . ." *Id.* § 1348(d) (emphasis added).

In keeping with this, the agency itself counsels its officials:

> A primary Congressional consideration underlying the Administrative Procedure Act is that a regulatory agency afford the public an opportunity to participate in its rule-making processes. Both the letter and the spirit of the rulemaking provisions of this act shall be observed. FAA follows the principle that the public interest is best served when regulatory affairs are open to the public to the fullest extent possible.

FAA Rulemaking Policies, FAA Order 2100.13, ¶ 22.a. at page 8 (1976).

The Court has spoken forcefully of the need for rulemaking:

> The rule-making provisions of [the APA], which the Board would avoid, were designed to assure fairness and mature consideration of rules of general applicability. . . . They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention.

NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 1969); *see also Nader v. Butterfield*, 373 F. Supp. 1175 (D.D.C. 1974) (internal FAA memo approving use of x-ray machines to inspect carryon luggage voided for lack of compliance with APA).

As it stands, the Fifth Circuit's decision approves a regulatory system where the Administrator issues formal regulations in the *Code of Federal Regulations* governing aircrew conduct, but whomever he or she may happen to be at the moment, or officials of any region, may write a letter to a single airline and create or amend them. (*See* Exhs. D, a-94; Exh. E, a-96; and Exh. G, a-102.)

Senator Pat McCarran, APA sponsor and Judiciary Committee Chairman, called it:

> a comprehensive charter of private liberty and a solemn undertaking of official fairness. . . .
>
> a bill which . . . is one of the most important measures that has been presented to the Congress of the United States in its history. . . .
>
> a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the federal government. . . .

S. Rep. No. 248, 79th Cong. 2d Sess. at III, 297 and 298 (1946).

The fact that the court below has applied the case-by-case adjudicatory principle to excuse the FAA from following APA public notice and comment procedures (5 U.S.C. § 553) in safety rulemaking in the face of a congressional mandate and the agency's own directive to do so, underscores, we respectfully submit, the need for the Court to clarify the limited scope of the *Chenery II/Bell Aerospace* exception.

The FAA's failure to either publish its taxi-standing policy in the *Federal Register*, *id.* 552(a)(1), or promulgate it as a substantive rule through APA public notice and comment procedures, *id.* § 553, requires that the case against Capt. Tearney be dismissed. *Id.* §§ 552(a)(1) and 706(2)(A) & (C).

II. "Public interest" unconstitutional basis for license penalties.

No statute or regulation so much as hints that the FAA may order suspension or

revocation of a license as a penalty for the violation of a safety rule.[12] Agency officials never deny this. What they claim is that certain language in § 609 of the FA Act, 49 U.S.C. § 1429(a), authorizes them to suspend or revoke certificates anytime they (in the name of the Administrator) deem it to be in the interests of the public and airsafety.

Section 609's pertinent language:

> The [Administrator] may, from time to time, **reinspect** any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may **reexamine** any civil airman. **If, as a result of** any such reinspection or reexamination, or **if, as a result of** any other investigation made by the [Administrator], **he determines that safety in air commerce or air transportation and the public interest requires**, [he] may issue an **order** amending, modifying, **suspending**, or **revoking**, in whole or in part, **any . . . certificate . . .** Any person whose certificate is affected by such an order . . . under this section may appeal . . . to the National Transportation Safety Board . . . [emphasis added]

---

[12] Nor is there a shred of legislative history.

See also 14 C.F.R. § 13.19, and the Order of Suspension (a-1) which, after reciting details of the alleged incident and claimed violation, provides:

> By reason of the foregoing, the Administrator has determined that safety in air commerce and the public interest require the suspension of your airman certificate.
>
> Now, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by Section 609 of the Federal Aviation Act of 1958, as amended, that:
>
> (1) Any airman certificate now held by you, including Airline Transport Pilot Certificate No. 527802838, [sic--shall be suspended]

Although we submit that anyone who can parse a sentence can see that "public interest" is not a general grant of power but a condition subsequent to first reinspecting an aircraft or reexamining an airman ("if as a result of"), we assume here, *arguendo*, that this interpretation is reasonable. Thus the issue we present is whether "public interest" is sufficiently explicit language to show a constitutional

delegation of authority from Congress to the FAA to impose suspensions and revocations as penalties for the violation of safety rules. Put another way, the issue involves a common sense application of the English language.

A. Congress may not delegate its legislative power.

It is fundamental that Congress may not delegate its *Art. I, § 1* legislative power to create benefits or penalties. *United States v. Eaton*, 144 U.S. 677 (1892), *United States v. Grimaud*, 220 U.S. 506 (1910); *see also* Administrative Procedure Act, § 9, 5 U.S.C. § 558. The Fifth Circuit has recognized this basic principle:

> The federal constitution provides that "[A]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives", United States Constitution, Art. 1, § 1. Congress may not abdicate or transfer to others the essential legislative functions with which it is thus vested . . . [citing cases].

United States v. Gordon, 580 F.2d 827, 839

(5th Cir.), *cert. denied*, 439 U.S. 1051 (1978). It said further: "It is well established that a delegatee may formulate rules for violation of which the statute itself provides penalties imposable by judicial process, [citing cases, including *Grimaud*]." 580 F.2d at 840 (emphasis added). This makes the point nicely: Where is any statute which provides that suspensions and revocations may be imposed as penalties for safety violations? Nowhere.

B. APA requires specific delegation to impose a penalty.

This constitutional principle finds expression in § 9 of the APA:

> (a) This section applies, according to the provisions thereof, to the exercise of a power or authority.
>
> (b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

5 U.S.C. § 558(a) & (b). Its legislative history:

> This provision, limiting administratively imposed requirements to the auth-

> ority granted and delegated, **is designed to afford statutory recognition for the basic rule of law, embodied in judicial decisions.** The creation of penalties or benefits is exclusively the province of Congress.
>
> . . . .
>
> [It] means that agencies may not undertake anything which statutes or other adequate sources of authority (such as treaties) do not authorize them to do. Where these sources are specific in the authority granted **no additional authority may be assumed. . . . Sanctions in the way of penalties or relief must be identified and authorized by law, and where authorized they must in any case apply in the factual situation presented.**

S. Rep. No. 248, 79th Cong., 2d Sess. 34 and 274 (1946) (emphasis added). "No additional authority may be assumed" is another way of stating the premier maxim of statutory interpretation: Expressio unius est exclusio alterius. Congress chose civil money penalties with right to jury trial:

> (a)(1) **Any person** who violates * * * **any** rule, regulation, or order * * * **shall be** subject to a civil penalty of not to exceed $1,000 for each such violation . . .
>
> (2) Any civil penalty may be compromised by the [Administrator] . . . [emphasis added]

49 U.S.C. § 1471(a)(1) & (2). And:

> (a) The **trial** of any offense under this chapter shall be in the **district** in which such **offense** is committed [etc.] . . .
>
> (b)(1) Any civil penalty imposed or assessed under this chapter may be collected by **proceedings in personam** . . . Such proceedings shall conform as nearly as may be to civil suits in admiralty . . . **either party may demand trial by jury** of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be reexamined other than in accordance with the rules of the common law. . . .

49 U.S.C. §§ ~~1473(a)~~ & (b)(1) (emphasis added). Where does the FA Act say anything else? "Factual situation presented." The only factual situation that § 609 talks about is "reinspection" and "reexamination," qualifications matters. Congress wrote § 901 and § 903 with a high degree of clarity: Where in the act is there a hint that suspension or revocation may be imposed as a penalty?

To assume that Congress intended to authorize license penalties, one must also

assume that it told pilots (and other certificate holders) that they had the right to jury trial and, at worst, if found guilty, would pay only a money fine, but then turned right around and authorized an FAA official to determine in his sole discretion whether that pilot could ever exercise those rights, and substitute administrative justice with a harsh--often draconian--penalty.[13]

With all due respect to the Fifth Circuit, it seems to be saying that a "rose is a rose is a rose," that public-safety is public-safety is public-safety. 868 F.2d at 1455 ([redacted]). Nowhere does the court explain how "public interest" conveys a delegation of authority to impose a "penalty." The leading FAA case of *Pike v. CAB.*, 303 F.2d

---

[13] For a complete history of FAA enforcement, *see Smith*, **FAA PUNITIVE CERTIFICATE SANCTIONS: THE EMPEROR WEARS NO CLOTHES; OR, HOW DO YOU PUNISH A PROPELLER?**, 14 Transp. L.J. 59-100 (1985) (hereinafter *"Emperor"*).

353, (8th Cir. 1962), is instructive. A commercial pilot, Pike was charged with giving flight instruction when he did not possess an instructor's certificate. The circuit court reversed revocation of his license because nothing in the statutes or FAA regulations specifically forbade him from giving instruction. Blackmun, J. (then circuit judge):

> This lack of specificity and completeness of the Regulations disturbs us for this case. Because of this we are disinclined to reach a result, drastic in its application to the individual concerned (whether it be Pike or any other), which deprives an airman of admitted experience and ability his primary means of livelihood. [Citing cases] We prefer to have, where a result of that magnitude is to be forthcoming, a statute or regulation which is more positive and definite than those here involved.

Id. at 357. To deprive an airline captain of his right to earn a living, even for seven days, is hardly insubstantial. And as seen from the emergency order (Exh. A, a-82) in *Tearney II*, the instant case was

used as an excuse to escalate the punishment to a total deprivation of his adult career. *See Pastrana v. United States*, 746 F.2d 1447 (11th Cir. 1984) (pilot's license is a property right).

See also Connally v. General Construction Co., 269 U.S. 385, 391 (1926) (It is axiomatic that a statute is unconstitutionally vague if persons of "common intelligence must necessarily guess at its meaning and differ as to its application."); and *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("Vague laws offend several important values.").

It is also puzzling as to why the court talks about "due process." 868 F.2d at 1455 ([redacted]). Nowhere in his briefs before the Fifth Circuit did petitioner raise any question about the Fifth Amendment right to due process. It is simply not relevant.

Although the lower court did not do so in connection with this issue (nor any

other that petitioner raised), 868 F.2d at 1454 ([redacted]), it cites *Komjathy v. National Transp. Safety Bd.*, 832 F.2d 1294, 1296 (D.C. Cir.), *Cert. denied*, ___ U.S. ___, 108 S.Ct. 2825, 100 L.Ed.2d 926 (1988), for the proposition that there is a statutory basis for suspension sanctions. But even the NTSB in that case recognized the obvious:

> "This statute [§ 1429(a)] does not explicitly state that the Administrator may suspend a certificate for violations of the FAR; however, a prior version of this section which contained similar language has been construed to authorize the suspension of an airman license for violations of safety regulations. 4/ In *Wilson*, the court rejected the argument that the then §609 which provided for the suspension of an airman certificate "if the interest of the public so requires" did not authorize a suspension for the violation of regulations.

Komjathy, NTSB Order No. EA-2343, SE-6249, July 14, 1986. "Wilson" refers to *Wilson v. CAB*, 244 F.2d 773, *cert. denied*, 355 U.S. 870 (1957). It was followed the same year by *Hard v. CAB*, 248 F.2d 761 (7th Cir.),

cert. denied 355 U.S. 960 (1957), then by *Pangburn v. CAB*, 311 F.2d 349 (1st Cir. 1962). None of these three dealt with this *Art. 1, § 1* delegation issue, much less any APA issue. Much later came *Go Leasing, Inc. v. NTSB Bd.*, 800 F.2d 1514 (9th Cir. 1986), *and Komjathy, supra*. Like the Fifth Circuit, neither explained how "public interest" can be equated with a delegation of authority to impose a penalty. A general congressional exhortation to go forth and do good, without more, is not a proper foundation for the sound development of administrative law." *Global Van Lines v. ICC*, 714 F.2d 1290, 1295-96 (5th Cir. 1983). *See also, Jensen v. Administrator of Federal Aviation Administration*, 641 F.2d 797, 799 (9th Cir. 1981), *vacated*, 680 F.2d 593 (9th Cir. 1982) ("'[I]n the public interest' and 'would not adversely affect safety'. . . [do] not give the court a sufficient basis for review. . . .").

The FAA's claim of authority is "not in accordance with law," it is "contrary to constitutional right," and "in excess of statutory jurisdiction." For that reason this case should be dismissed. 5 U.S.C. § 706(1)(A), (B) and (C).

III. FAA failure to publish or promulgate license-penalty policy violates APA and requires dismissal.

As may be seen from the order (a-1), suspension of Capt. Tearney's Air Transport Pilot license rests on the contention that FA Act § 609, 49 U.S.C. § 1429(a), authorizes its officials to suspend or revoke anytime they deem it to be in the interests of air safety and the public.

As a reading of that section discloses, it says nothing of offenses, violations, regulations, sanctions or penalties. It speaks only of qualifications matters, reinspection of aircraft, reexamination of airmen; also true of 14 C.F.R. § 13.19, the rule which implements it. Yet FAA use of §

609 involves a dichotomy: suspension-revocation for lack of qualifications; as an alternate penalty to that of a civil-money fine.

Since the section 609 contains no language relevant to suspension, the claim that the FAA may suspend or revoke as a penalty, on its face, is "an interpretation of general applicability formulated and adopted by the agency," as well as a "statement of general policy," within the meaning of the APA, 5 U.S.C. § 552(a)(1).

The policy is referred in FAA manuals (**but not in any regulation**), for example: "[V]iolation of any rule, regulation or order issued by the Administrator is punishable either by certificate or civil penalty action." Manual of Procedures 22, Bureau of Flight Standards, Federal Aviation Agency at .0, *Enforcement Authority* (1960). At present: "Suspension may be used for punitive purposes where the nature of the vio-

lation warrants it . . ." Compliance and Enforcement Program, FAA Order 2150.3, ¶ 205.b(4) at page 15 (1980).

Statistics from 1979 reflect that 2,400 punitive certificate action cases were closed.[14] For private and student pilots, of all enforcement actions, including civil penalties, 87% were by suspension; 60% for general aviation as a whole, which includes professionals like air-taxi and commuter pilots; 20% for airline pilots. Given that the agency concedes that 99% of all violations are first offenses, and generally involve inadvertent acts, such substantial use of a penalty with often severe impact should be rather startling to those unfamiliar with FAA enforcement. *Emperor* at 60-63. Because of recent emphasis, license penalties for all pilots run as high as 95%, in 2,000 to 3,000 cases annually.

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[14] We know of none published since.

The question naturally occurs: Why would this important regulatory agency, especially when no statute hints at it, not have a rule that tells pilots that their licenses are at risk for safety violations?[15] Finding the answer to that, however, is not relevant to the issue petitioner raises.

The only issue is whether the APA, 5 U.S.C. §§ 552(a)(1), 553 and 706, requires that the license-penalty policy be either published in the Federal Register, pursuant to *id.* § 552(a)(1), or promulgated through public notice and comment procedures, pursuant to *id.* § 553.

The FAA does not deny the obvious, nor

---

[15] There once was a rule: "Pilot's and mechanic's licenses will be suspended or revoked for--(A) Violating any provision of the air commerce act of 1926 or these regulations . . . (F) Violating air traffic rules." Dept. of Commerce, Air Commerce Regulations, § 74 (1926); *see also* Civil Air Regulations, 14 C.F.R. §§ 20.371 and 20.37110--(*k*) (1938). (All three in appendix.) The FAA, in at least a dozen briefs, has never acknowledged these rules, much less explain why they were appropriate from 1926 to 1940, but not since.

did the circuit court: the license-penalty policy is indisputably a "statement of general policy," and/or an "intepretation of general applicability formulated and adopted by the agency" and, because of its impact on the individual, it is unarguably "substantive." Nor has the policy been published or promulgated. Consequently, as these are given, and since Congress has mandated that the remedy for such failure is dismissal, *id.* §§ 552(a)(1) and 706, we submit there is no issue, that the FAA has defaulted.

In raising this matter, petitioner assumes, *arguendo*, that the agency has lawful authority to adopt the policy. We doubly stressed this with the Fifth Circuit. It acknowledged the APA issues: "Tearney's next claim is that the FAA's failure to publish or promulgate its certificate-sanction policy violates the APA." 868 F.2d at 1454 ([redacted]). But immediately followed with:

"He argues that the FAA is not empowered to authorize certificate actions as a sanction for a safety violation." *Id.* **Then never again mentions the APA.**

With all due respect to the lower court, the latter statement is without foundation. Nowhere in the presentation of this APA issue did we question such authority. The issues assume it, assume that the interpretation is reasonable. The only question is compliance with the APA.

What happened is this: since it cannot, and does not deny that the license-penalty policy is an interpretation of § 609 which requires publication, using it as a red-herring, rather than discuss the APA, the FAA spent many pages in their brief talking about their authority for license penalties. Obviously, it worked.

The Court has squarely held that placing a policy in an agency manual is not sufficient, that for it to be enforceable the

publication requirements of the APA must be followed. *Morton v. Ruiz*, 415 U.S. 199 (1974). "The statute [5 U.S.C. § 552(a)(1)] clearly provides that no administrative action taken pursuant to unpublished procedures can be allowed to stand against a person adversely affected thereby." *Northern California Power Agency v. Morton*, 396 F.Supp. 1187, 1191 (D.D.C. 1975), *affirmed* 539 F.2d 243 (D.C. Cir. 1976). "Any agency regulation that so directly affects preexisting legal rights or obligations . . . indeed, that is 'of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect of any subject within its competence,' is within the publication requirement [of the APA]." *Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1977). "The purpose of requiring a statement of the basis and purpose is to enable courts, which have the

duty to exercise review, to be aware of the legal and factual framework underlying the agency's action." *Am. Standard, Inc. v. U.S.*, 602 F.2d 256, 269 (U.S.Ct. of Claims 1979). "Any claim of exemption from APA rulemaking requirements 'will be narrowly construed and only reluctantly countenanced.' [Citing cases]" *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983).

As the Fifth Circuit's decision stands, it approves of a remarkable situation: Without any statute to support it, the Federal Aviation Administration employs in the vast majority of its safety enforcement cases a harsh penalty that is normally reserved for the most serious offenses, claims that it has authority to deny a pilot his statutory right to jury trial, yet neither publishes nor promulgates its claims in the *Federal Register* or *Code of Federal Regulations* where they may be read

by layman and lawyer alike, or challenged.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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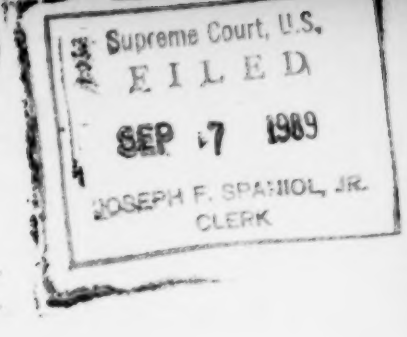
September 1989

89-512



No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

_____

BARNEY J. TEARNEY **Petitioner,**

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, and NATIONAL TRANSPORTATION SAFETY BOARD, **Respondents.**

_____

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

APPENDIX TO ACCOMPANY THE PETITION

_____

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3938 E. Grant Rd., #191
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(602) 326-0283
Counsel for Petitioner

September, 1989

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* * * * *

U.S. Department of Transportation
Federal Aviation Administration
Southwest Region
P.O. Box 1689
4400 Blue Mound Road
Fort Worth, Texas 76101

July 9, 1986

CERTIFIED - RETURN RECEIPT REQUESTED

To: Mr. Barney Joseph Tearney
9422 Whisper Point
San Antonio, TX 75240

ORDER OF SUSPENSION

You were advised by mail, through a Notice of Proposed Certificate Action dated February 26, 1986, of the circumstances and reasons why we proposed to suspend your Airline Transport Pilot Certificate No. 527802838.

After considering all the evidence presently a part of this proceeding, including the information you presented at an informal conference on May 6, 1986, the Administrator of the Federal Aviation Administration, acting by and through his Regional Counsel, has determined that:

1. You hold Airline Transport Pilot Certificate No. 527802838.

2. On November 11, 1985, you acted as pilot in command of Civil Aircraft N67SW, a Boeing Model B-737-200, being operated as Southwest Airlines Flight 360, from New Orleans, Louisiana to Dallas, Texas.

3. As the above said aircraft was taxied from the terminal to the runway at New Orleans, Louisiana, a number of passengers were standing in the aisle of the passengers' cabin of the said aircraft.

4. In taxiing the said aircraft as described in paragraph three above, when passengers were standing in the aisle, you operated the aircraft in a careless manner.

By reason of the foregoing, you violated Section 91.9, of the Federal Aviation Regulations which prohibits a person from operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

By reason of the foregoing, the Administrator has determined that safety in air commerce and the public interest require the suspension of your airman certificate.

NOW, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by Section 609 of the Federal Aviation Act of 1958, as amended, that:

(1) Any airman certificate now held by you, including Airline Transport Pilot Certificate No. 527802838 [sic--shall be suspended];

(2) Said suspension shall become effective on August 4, 1986, and shall continue in effect until said certificate has been suspended for a period of 7 days;

(3) Said certificate shall be surrendered by mail or delivery to the Regional Counsel of the Federal Aviation Administration, Southwest Region, 4400 Blue Mound

Road, P.O. Box 1689, Fort Worth, Texas 76101;

(4) If you surrender your certificate prior to August 4, 1986, the effective date of this Order, said suspension shall continue in effect until 7 days subsequent to the actual date of surrender thereof to the Federal Aviation Administration; and

(6) No application for a new airline transport pilot certificate shall be accepted from you, nor shall any airline transport pilot certificate be issued to you, during the period of suspension imposed by this Order.

HAYS V. HETTINGER
Regional Counsel

By: /s/
Don L. Bachman
General Attorney

Enclosure
Appeal Sheet

[p.2]

APPEAL

You may appeal from this Order within

twenty (20) days from the time of its service upon you to the National Transportation Safety Board, Office of the Administrative Law Judges, Washington, D.C. 20594. Any such appeal which you make should refer to the case number shown at the top of the first page of this Order. You are hereby advised that a copy of the Order will be forwarded to the National Transportation Safety Board in the event you appeal and will be considered the Administrator's Complaint.

(Transcript of Hearing)

Adm'r v. Tearney, NTSB Docket No. SE-7569
Hearing, Jan. 30, 1987, U.S. Courthouse,
San Antonio, Texas. Hon. Thomas J. Reilly,
Administrative Law Judge

ORAL INITIAL DECISION

JUDGE REILLY: This has been an evidentiary proceeding under section 609 of the Federal Aviation Act of 1958, as amended, 49 USC 1429, conducted pursuant to the Board's

Rules of Practice in Air Safety Proceedings, 49 CFR 821.

Both sides were represented by counsel. The hearing today was the result of an appeal of the Administrator's Order of Suspension, issued through his Southwest Regional Counsel, in a letter to the Respondent dated July 9, 1986, which Order of Suspension became the complaint in this proceeding, pursuant to the Board's Rules. The Administrator had the burden of proof.

[p.111]

I have elected to issue an oral decision pursuant to the Board's Rules. The complaint in this proceeding -- that is, the July 9 Order of Suspension -- just looking at it again briefly and paraphrasing, charges that the Respondent, an ATP, holder of an airline transport pilot certificate, a captain for Southwest Airlines, on November 11, 1985, while pilot in command of a Boeing 737 being operated as Southwest's Flight

360 from New Orleans, Louisiana to Dallas, Texas, taxied the aircraft to the runway while a number of passengers were still standing in the aisle, and the Administrator charged a violation of 91.9, the standard careless or reckless operation section, and is seeking a seven-day suspension of the captain's airman's certificate.

We have had a series of these cases, as both counsel are aware, since both of them were in involved in just about every case of this nature involving Southwest Airlines, and they don't become any easier to decide, because they are each one a credibility matter.

In each one there is perhaps one passenger, maybe two, testifying to seeing people standing in the aisle, and there is usually a line of Southwest Airlines people, flight crew, sometimes flight attendants, testifying that no such thing ever happened.

And, of course, the passengers' recollection is

[p.112]

scrutinized on cross-examination, and every little detail that he can't remember accurately is pounced upon as if that casts doubt on his credibility as to whether the passengers were standing.

Now, for all I know -- I am not omniscient -- perhaps the flight crew is telling the truth and their recollections are accurate, and maybe the passenger's recollection is inaccurate, but I have got to make a determination based upon my impressions of the witnesses and all the circumstances, and I find no reason to doubt FAA Inspector Hicks version of what happened.

There were some events or some circumstances he could not clearly remember and some, in fact, that were contradicted by the evidence as to, for example, when the engines started. He thought the engine

had started after the pushback was completed, but the evidence leads me to conclude that in fact because of a problem with the APU, the engines were started at the gate; however, I do observe that the engines clearly go up to a much louder roar when they are started to overcome the inertia of standing still at the end of the pushback to actually move this very heavy airplane, almost fully loaded, if not fully loaded, to get it to move forward so that much louder roar, if not focused upon at the time, might mislead people listening casually to assume that the engine was started at that moment, at

[p.113]

least when they are looking back on the events or asked to look back on the events some year-and-a-half later.

So I don't find any of his failed recollections, as to details like that, to really cast into doubt his basic testimony on

what he saw vis-a-vis the passengers standing in the aisle.

Also, with regard to not seeing three people in the cockpit, it is obvious from observation of anyone who has traveled on airline aircraft and, in this case, that exhibits, that there is a very limited view from the viewpoint of a passenger sitting midway back in the passenger cabin, rows 11 through 14, anywhere in there, of what and who is inside the cockpit area.

I do believe that is is consistent with credibility that Inspector Hicks, from sitting in an aisle seat on the right-hand side of the passenger compartment, could see the crewman sitting in the left seat, if the cabin door were open, but as to whether not he could recall whether there are two people or three people in there, perhaps he saw only two, and there was a third person sitting in the jumpseat. I don't find that is material in questioning

his recollection.

He also likewise recalled seeing only two flight attendants, and apparently there were three, but they could have been scattered anywhere around the cabin area during

[p.114]

this period or even behind a partition in one area or another.

I don't think that that is material that he would not know for certain whether there were two or three flight attendants. Perhaps in fact he did only see two, and there was a third somewhere else. I don't think that is a material attack on his credibility.

He was clear and very definite on his observations regarding the passengers standing. There were several standing during the pushback; there were several standing still while the aircraft was taxiing to the hold line prior to the active runway, and with his aviation background, I don't think

there could be any confusion between push-back time and the taxi period going right up to the hold line for the active runway.

And Mr. Hicks was very clear that the passengers were still standing up to right before taxiing out on the runway for takeoff. This is a clear violation of the Regulations, 91.9, and as we have had an argument before and the Board has disposed of it, even though there are not specific prohibitions in the regulations in the regulations, it is clearly covered by FAR 91.9, with regard to careless operation, and I don't deem this to be reckless, but I do deem it to be careless operation to taxi with passengers still standing in the aisle.

[p.115]

There is no way that the Federal Aviation Regulations could specifically and expressly delineate every possible imaginable type of careless operation in

express terms, and that is the purpose of a section like 91.9, relating to, in general, careless or reckless operation, but that has been disposed of by the Board in an earlier decision; I think it was Administrator against Lawson.

Now, with regard to the applicability of the NASA report, I have some serious problem with this along the two grounds that Administrator's counsel has raised. First of all, it is expressly provided in the advisory circular, AC-00.46(b) or (c) -- I forget the subsection letter. It clearly provides that the immunity provisions are only activated if it is filed within ten days after the subject incident. Eleven days is close, but there is no cigar for being late. I never heard of immunity being provided when it was outside the ten-day period provided.

But even if there was some room for Solomon-like charity in saying, "Well,

eleven days is pretty close to ten," the second problem I find is just as serious to using that as an immunity basis, and that is the deliberate act versus inadvertent.

And the best way to distinguish this, I think, is that when an airline pilot "busts" an altitude on IFR --

[p.116]

and we have a lot of those cases -- that is an inadverent act; no one plans to bust an IFR altitude, and there have been cases where we have applied the immunity provisions to that situation.

But when a flight crew has the cockpit door open and they are both repeatedly supposed to -- and claim they did look back to check the cabin area, and they continue to taxi with passengers standing in the aisle, this is not an inadvertent act; this is a deliberate act.

I think that it is a planned act that is an attempt to make up for, for example, in

this case, a 30-minute late departure, and therefore, I don't think it is the kind of "inadvertent" act covered by the Advisory Circular for the NASA ASRS report.

We had only one witness today for the Administrator, and that was FAA Inspector Charles Hicks, and he happened to be travelling as a passenger on this flight; he was not conducting an en route inspection. This was simply a flight after visiting some relatives in New Orleans, and he is the one that testified that he saw passengers standing in the aisle.

His attention was first brought to performance of the flight crew when he observed that there was no oxygen briefing till after the takeoff, and he was of the belief that this was a violation.

[p.117]

He later on checked with air carrier people in that area and found out that that was permissible and, although he made no

written report about it, he did recall the further incident about the passengers standing in the aisle.

He was looking back from his seat on the aisle on the right-hand side of the aircraft looking foward, observing what was going on in the cabin, and noticed several people standing in the aisle, struggling with their luggage, to put the luggage in the overhead racks, and he noticed that this continued throughout the taxi.

It is true that he wasn't looking constantly down the aisle behind him to see these passengers. He looked away and looked back several times, and I don't think it is material that it is philosophically possible that they could have sat down and then jumped up again in the period that he looked away from the passengers.

We do have flight attendants and the flight crew, and they are supposed to ensure that everyone is seated prior to taxi

and during taxi, and I am sure if anyone jumped up again, certainly a couple of people, as indicated here, it would have been the duty of the flight attendants to immediately get those people back down in their seats.

We had a series of exhibits offered and received

[p.118]

in evidence. A-1 through A-3 were received. A-4 was an FAA computer printout that I denied admissibility to, since it was an alleged prior violation item, but it did not result in any kind of violation; only a warning letter, and I don't think that has any materiality on either the credibility or the type of sanction that Captain Tearney would be open to for a violation such as this.

Now, on the Respondent's case we had four witnesses testify: First Officer Kramer on the particular flight; Mr. Evans, who

was riding the jumpseat, a Braniff mechanic riding a jumpseat on that flight -- he is another Southwest Airlines captain -- and, of course, Captain Tearney himself.

As I pointed out before, all of these witnesses testified that there were no passengers standing in the aisle at the time of taxi. Now, back in medieval days we would count the number of witnesses and say that the side that had the most witnesses has to prevail, but we don't do that anymore, and I have to still assess the credibility of the witnesses.

And even though there is only one witness for the Administrator, I am impressed that he was telling what he actually saw and not some figment of his imagination.

The Respondent offered and had received in

[p.119]

evidence seven exhibits, R-1 through R-7. Of course, R-1 was the receipt from the

NASA ASRS reporting program, which indicates that NASA received a report from Captain Tearney some 15 days after this incident, but it has been admitted that the report was filed eleven days after the incident and, in fact, was filed on the advice of counsel for Southwest Airlines, Mr. Zimring.

Exhibit R-2 of the Respondent was a excerpt from the compliance and enforcement handbook of the FAA, FAA Handbook 2150.3, to raise the question that the inspector didn't precisely follow FAA's procedures for violations; that he should have written down the facts of the violation and not just relied on oral transmission to the principal ops inspector for the airline. Again, don't find that that in any way eliminates or casts question upon his credibility.

R-3 was Southwest Airlines flight operations manual. R-4 was a flight release

which, among other things, establishes that there was an APU inoperative problem on the date in question, requiring starting the engine at the gate.

R-5, 6, and 7 were color pictures of the interior of the passenger compartment of the aircraft, looking forward toward the pilot compartment in the case of two of them, and the clearly established that there were

[p.120]

some backward facing seats which Mr. Hicks did not recall, but I notice that some of them were behind a partition that was well behind his seat. There were a couple towards the front, though, about row 1, that he could have seen, but might not have noticed or remembered.

So after due consideration of all the evidence, I find that the Admninistrator has met his burden of proof and proven by a preponderance of the substantial, reliable,

probative, and credible evidence that the Order of Suspension should be affirmed.

I think seven days is well within the parameters for this type of violation, as established by prior cases: Administrator against Lawson and others. So I affirm the Administrator's order. I find that safety in air commerce or air transportation and the public interest requires affirmation of the Administrator's order. It is hereby affirmed.

There are further appeal provisions, but we have experience counsel on both sides that well know how to further appeal my decisions.

These proceedings are concluded. Thank you, gentlemen.

(Whereupon, at 12:28 p.m., this hearing was concluded.)

/s/Thomas W. Reilly

Edited & signed
16 February 1987
Washington, D.C.

SERVED: June 17, 1988
NTSB Order No. EA-2738

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the
NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of June, 1988

T. ALLAN MCARTOR, Administrator, Federal Aviation Administration, Complainant, v. JAY M. MIRANDA, PATRICK LOGAN, and BARNEY J. TEARNEY, Respondents.	Dockets SE-7611 SE-7487 SE-7569

OPINION AND ORDER

These three cases are being consolidated because they all involve Southwest Airlines (Southwest) Captains who are alleged to have taxiied aircraft in scheduled, passenger-carrying operations conducted under Part 121 of the Federal Aviation Regulations (FAR) with passengers still standing,

in violation of FAR 91.9. 1/

1/ Section 91.9 provides as follows:

"§91.9 **Careless or reckless operation**.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[p.1]

Respondents are appealing from three separate initial decisions of Administrative Law Judge Thomas W. Reilly, issued from the bench at the conclusion of three separate hearings held in these cases. 2/

On the basis of the evidence adduced at the three hearings, evidence that the law judge set forth in each of the three initial decisions, the law judge determined that the Administrator had established that each of the three Captains had taxiied an aircraft in scheduled, passenger-carrying operations conducted under FAR Part 121, with passengers standing. 3/ The law judge

further found that, by doing so, each pilot-in-command was careless in violation of FAR Section 91.9, and the law judge affirmed suspensions of each respondent's airline transport pilot (ATP) certificate, each for a period of 7 days. Finally, the law judge found that, by virtue of his filing of a report under the Aviation Safety Reporting System (ASRS), Respondent's Miranda's sanction was waived.

2/ Copies of the initial decisions, issued from the bench, that are excerpted from the transcripts, are attached. The decisions were issued at the conclusions of hearings held as follows: Respondent Miranda, November 20 and 21, 1986; Respondent Logan, December 17, 1986; and Respondent Tearney, January 30, 1987.

3/ The Southwest flights involved were: Miranda: Flight 419, December 28, 1985, Tulsa-Houston, Boeing 737-200.

Logan: Flight 49, October 24, 1985, Dallas-Houston, Boeing 737-200.

Tearney: Flight 360, November 11, 1985, New Orleans-Dallas, Boeing 737-200.

[p.2]

Each of the three respondents has filed a brief in support of his appeal. Respondent Miranda and Respondent Tearney each raise the same issue, whether the preponderance of the evidence of record supports the law judge's finding that these respondents actually did taxi aircraft with passengers standing. In contrast, Respondent Logan concedes that he did in fact taxi an aircraft with passengers standing but contends that the law judge's rejection of his affirmative defense, that he did so in order to avoid a collision between his plane and one being towed by ground personnel, was in error.

All three respondents object to the classification of the alleged violation

under FAR Section 91.9, contending that, by so doing, the Administrator is regulating on an ad hoc basis because there is no express prohibition in the regulations against taxiing with passengers standing.

All three respondents allege bias, contending that the law judge has become so convinced that the FAA's position with regard to the legal issues raised in the "taxiing with passengers standing" cases is so "righteous" that he cannot give a fair consideration to the issues raised.

Respondent Miranda also alleges, as law judge error, the characterization of the National Aeronautics and Space Administration's (NASA) Aviation Safety Reporting Program (ASRP) privilege as a "one-time" privilege. Although this

[p.3]

characterization was innaccurate, 4/ the error was harmless and, clearly, immaterial to the outcome of Miranda's case. The Board

likewise does not regard the law judge's mention of Southwest's 10-minute turnaround time, an item respondent claims is outside the record, as reversible error. 5/

Additionally, Respondents Miranda and Tearney argue that the Administrator failed to prove that each is the holder of an ATP certificate as alleged in Paragraph 1 of the complaints. They also argue that the law judge should not have entered into the questioning on the matter of proof of certificate. The Board finds no merit to this contention. The evidence adduced, the flight log and the loading schedule for the flights identified in the complaints, both list the respondents as Captain. Since Southwest

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4/ The most recent Advisory Circular issued on the subject of the ASRP (AC-0046C) states in pertinent part: "The filing of a report with NASA [will result in sanction

immunity] provided:

* * * *

(3) The person has not been found in any prior FAA enforcment action to have committed a violation of the Federal Aviation Act, or of any regulation promulgated under that Act for a period of 5 years prior to the date of the occurence." (Emphasis added).

5/ We do not agree that Judge Reilly's reference to 10-minute turnaround time is without some record support. There are exhibits in each of the three cases that reveal turnaround times that are exceedingly brief. The turnaround time in Miranda happens to be 15 minutes; however, the testimony in these cases contains numerous references to short turnaround times.

[p.4]

conducts flights under FAR Part 121, this means that the flights required that the Captains have ATP certificates. In respect

to the law judge's participation in the witness examination, the law judge is entitled to clarify the record. On this issue, the record is clear. Each respondent was Captain of a Part 121 operation, hence he has an ATP.

The Administrator has filed a separate reply in each of the three cases the substance of which will be set forth wherever relevant in the discussion of the issues on appeal.

Upon consideration of the briefs, the exhibits, the testimony, and the entire record in each of the three cases, the Board determines that safety in air commerce or air transportation and the public interest require that the Administrator's orders and the initial decisions affirming them be affirmed. We adopt the findings of the law judge in each case as our own.

We address each of the allegations not already dealt with in the discussion of

respondent's allegations on appeal. We turn first to the challenge of Respondents Miranda and Tearney that the evidence of record in each case does not support the law judges findings that each of these respondents did taxi with passengers standing. In both cases, the law judge listened to the testimony presented and he made credibility findings in favor of the Administrator's witnesses. In the case of Miranda, the law judge found more credible the testimony of a passenger, Ms. Vicki Henrichs, who stated

[p.5]

that she saw at least 2 or 3 people still standing in aisle back of her (from her seat in row 3) while the aircraft taxiied forward, that they were carrying packages, and they they were standing waiting to move to their seats. Three persons, a senior flight attendant on duty, a deadheading Southwest employee, and the First Officer, all testified that there were no passengers

standing during taxi and that they so notified Respondent Miranda who did not look back into the passenger cabin and who had directed the senior flight attendant and the First Office to so inform him.

The law judge made a credibility finding in favor of the passenger (I.D.-p. 173) and the Board finds no reason to disturb it. It is well established that credibility determinations are the exclusive province of the trier of fact and that they are not to be disturbed unless patently erroneous, or arbitrary and capricious. 6./

Similarly, the law judge found credible the testimony of the passenger who testified at Respondent Tearney's hearing. The passenger happened to be an employee of the FAA, the holder of an ATP certificate with multiple

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6/ The Board may reverse a credibility determination only if the testimony is

inherently incredible or inconsistent with the overwhelming weight of the evidence. Administrator v. Klayer, 1 NTSB 982 (1970).

[p.6]

ratings, and an aviation safety inspector (Mr. Charles Hicks). In that case the witness stated that he saw the pilot look back into the passenger cabin in the course of taxiing the aircraft to the runway hold line and there were passengers standing. The Board has reviewed the testimony given by witnesses for both parties and finds that the law judge's credibility choices are not so inconsistent with the other evidence as to be inherently incredible. 7/ We have noted the inconsistencies pointed out by respondent's counsel in regard to the Administrator's eyewitness's testimony in Tearney and in Miranda and find that they are not so significant as to require reversal of the credibility determination in light of the entire record.

In the case of respondent Logan, who admitted that he taxiied his aircraft with passengers standing, the law judge rejected his explanation based upon the law judge's detemination that it was not credible. Having reviewed the record, we perceive no reason to challenge the determination. Moreover, we do not find that the law judge was inconsistent in his evaluation of Captain Logan's explanation in comparison to his evaluation of the Government's eyewitness in Tearney. (See Captain Logan's explanation, Tr. pp. 33-44).

7/ Respondent Tearney's eyewitnesses were his first officer, a deadheading mechanic, a deadheading Southwest Captain, and himself.

[p.7]

Turning next to the arguments regarding ad hoc regulation, this entire matter was dealt with at some length in Administrator

v. Lawson, Order EA-2419 (1986) and the denial of reconsideration in Lawson (Order EA-2466). The initial correspondence between Southwest and the FAA reveals that Southwest's operations manual (Exh. R-1 in Logan) does not expressly prohibit or allow the practice of permitting passengers to remain standing after pushback and prior to takeoff. It requires that all passengers be seated, with safety belts fastened, prior to takeoff. When the FAA informed Southwest that the practice of taxiing with passengers standing would be looked upon as a violation of FAR Section 91.9 (Exh. A-2 in Logan), Southwest counsel disagreed with the ruling. Nevertheless, all Southwest pilots were informed officially that the determination had been made that taxiing with passengers standing is per se a violation of FAR Section 91.9. In the view of the law judge, the ruling is specific and clear and it is enforceable. On this issue,

the Administrator argues that respondents had been fully apprised that such a ruling had been made, that the regulations cannot contain a complete list of every prohibited act, and the the potential threat to air safety was clarified in Lawson. The Board determines, on the basis of Lawson, wherein evidence as to the hazards involved was adduced, that taxiing with passengers standing is a violation of FAR Section 91.9.

[p.8]

We turn now to the matter of law judge bias. The Board's policy in respect to bias is set forth in Petition of Spivey, 3 NTSB 2657 (1980), citing U.S. v. Grinnell, 384 U.S. 563 (1966). Respondents have made no showing that the law judge has any outside interest in the outcome of these cases nor that he has any personal adverse mental attitude towards any of these respondents. Respondents here argue that the law judge had already decided these matters before he

heard the cases. Although we recognize that the law judge postponed the hearing of these cases awaiting the Board's determination in Lawson, and that he now accepts the Board's ruling that taxiing with passengers standing is per se a violation of FAR Section 91.9, we do not find that the law judge had pre-decided the facts but only what might be termed the law, as interpreted by the Administrator and affirmed by the Board. Accordingly, we do not find that respondents have established bias on the part of the law judge. For that reason, we believe that respondent's alternative requests that these cases be remanded for hearing by another law judge should be denied.

In sum, the Board finds that the evidence adduced at the three hearings that were held supports the law judge's credibility findings, that any inconsistencies in the testimony are not so overwhelming as to

warrant reversal, that the credibility findings are neither arbitrary nor capricious, and that the law judge was not biased as that term has been construed by both

[p.9]

the Board and the Courts. Furthermore, for all the reasons set forth in Lawson, the Board believes it is now well settled that taxiing with passengers standing is detrimental to air safety and is per se a violtion of FAR Section 91.9.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeals are denied;

2. The Administrator's orders and the initial decisions affirming them are affirmed; and

3. The 7-day suspensions of the airline transport pilot (ATP) certificates of Respondents Logan and Tearney shall begin 30 days after service of this order. The suspension of Respondent Miranda's certificate is waived as a result of timely filing and

the law judge's determination of eligibility under the ASRP. 8/

BURNETT, Chariman, KOLSTAD, Vice Chairman, LAUBER and NALL, Members of the Board, concurred in the above opinion and order.

8/ For the purposes of this order, Respondents Logan and Tearney must surrender their certificates to an appropriate representative of the FAA pursuant to FAR SEction 61.19(f).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4558

BARNEY J. TEARNEY,

petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD; and T. ALLAN MCARTOR, Administrator, Federal Aviation Administration, Respondents.

Summary Calendar

April 4, 1989

Petition for Review of an Order of the National Transportation Safety Board.

Before POLITZ, KING and SMITH, Circuit Judges.

POLITZ, Circuit Judge:

Barney J. Tearney, a pilot for Southwest Airlines, was sanctioned for taxiing his aircraft while passengers were standing, in violation of Federal Aviation Regulations (FAR), 14 C.F.R. § 91.9. Tearney petitions for review of the National Transportation Safety Board's (NTSB) decision affirming

the Federal Aviation Administration's (FAA) ruling that he violated section 91.9. He claims that the FAA violated the Administrative Procedure Act (APA) in its adoption of the taxiing rule. He also questions the constitutionality of the sanctioning power. For the reasons assigned we deny the petition for review.

Background

On November 11, 1985, Tearney was captain of a Boeing 737 being operated as Southwest's flight 360 from New Orleans to Dallas. Passengers were standing in the aisle as Miranda [sic] taxied from the terminal to the runway. The Administrator of the FAA suspended Tearney's airline transport pilot's certificate for seven days for violating 14 C.F.R. § 91.9 which provides that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

Tearney appealed the order of suspension to the NTSB, claiming that his conduct did not violate section 91.9, and asserting that his actions were in accordance with Southwest Airlines procedures. The administrative law judge (ALJ) continued Tearney's hearing until the NTSB issued its decision in *Administrator v. Lawson*, NTSB Order No. EA-2419 (1986), *reconsideration denied*, NTSB Order No. EA-2466 (1987). In *Lawson* the NTSB ruled that taxiing while passengers were standing constituted a *per se* violation of section 91.9.

Ultimately the ALJ upheld the Administrator. In a review which consolidated the appeals of Tearney and two other pilots, *Administrator v. Miranda, Logan, and Tearney*, NTSB Order No. EA-2738 (1988), the NTSB rejected the appeals and affirmed the orders of suspension. Tearney timely petitioned this court for review of the NTSB decision.

Analysis

As we observed in our disposition of the petitions for review by the other two pilots, Miranda and Logan, our "review of an agency's decision is circumscribed. We may consider only whether the agency's findings and conclusions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or 'unsupported by substantial evidence.'" *Miranda v. National Transportation Safety Board*, 866 F.2d 805 (5th Cir. 1989) (*citing* 5 U.S.C. § 706(2) (A and E)). The Supreme Court has underscored that "the ultimate standard of review is a narrow one." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974). We consider Tearney's petition under this narrow standard.

[1] Tearney contends the the FAA violated the APA by using the adjudicatory process to institute the rule prohibiting

taxiing while passengers are standing. Tearney begins this argument by pointing out that in June of 1987 the FAA adopted through formal rulemaking a regulation concerning carry-on luggage, 14 C.F.R. § 121.589. *See* 52 Fed.Reg. 21476 (1987). He then suggests that because the FAA adopted the carry-on luggage regulation by formal rulemaking it could have implemented its taxiing rule in the same manner. While this is an obviously accurate observation, it provides Tearney with little surcease. That the FAA could have promulgated its taxiing rule through formal rulemaking does not mean that it should have done so. The FAA has broad discretion to proceed via formal rulemaking or on a case-by-case basis when it addresses safety concerns. As we held in *Miranda v. National Transportation Safety Board*, in choosing the latter method it committed no error.

In *SEC v. Chenery Corp.*, 332 U.S. 194,

203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995, 2002 (1947) (citation omitted), the Supreme Court unequivocally stated that an

> agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.

In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294, 94 S.Ct. 1757, 1771-72, 40 L.Ed.-2d 134, 154 (1974), the Supreme Court reaffirmed *Chenery* and held that an agency "is not precluded from announcing new principles in an adjudiciative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion."

In our related decision on behalf of Southwestern pilots Miranda and Logan, as well as in *Nicholson v. Brown*, 599 F.2d 639, 648 (5th Cir. 1979), we relied on

Chenery in reaffirming that an administrative agency "may at its discretion announce and apply new rules in an adjudicative proceeding" (citation omitted). In *Nicholson* we stated that "[i]f agencies are free to announce and apply new rules in adjudicative proceedings, *a fortiori* they are free to announce and apply interpretations of existing regulations." *Id.* at 648. We stressed, however, that in order to constitute such an abuse, an adjudicative rule must be "such a new departure that [it] could not reasonably have been foreseen." *Id.* at 649.

The FAA's taxiing rule may not be said to be "such a new departure" from its other regulations as to be considered unforeseeable. The taxiing rule is not a departure from the general safety requirements set forth in section 91.9, but is, rather, a specific articulation of what is required by that section. Moreover, the taxiing rule

was foreseeable. We are mindful of the fact that the NTSB, charged by Congress with special responsibilities in the area of transportation safety, concluded that "the general policy that passengers must be seated before the aircraft departs the boarding area . . . is a well-established safety policy. . . ." *Administrator v. Lawson*, NTSB Order No. EA-2738 (1988) at 6 [sic: the court means *Miranda, Logan and Tearney*]. We therefore conclude and hold that inasmuch as there was no foreseeable departure, there was no abuse of agency discretion.

[2] Tearney next alleges that the FAA violated section 552(a)(1) of the APA by failing to publish the taxiing rule in the *Federal Register* as a new policy. This claim also founders. Section 552(a)(1) provides that:

> Except to the extent that a person has actual or timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adverse-

> ly affected by, a matter required to be published in the Federal Register and not so published.

Under this section, persons with actual notice of a rule, even though unpublished, are held accountable. Southwest had notice of the taxiing regulation and made the FAA's position known to its pilots through a Southwest Airlines interoffice memo dated April 8, 1985, advising that:

> The FAA has informed us that they are taking the position that taxiing while passengers are standing in the aisles is a *per se* violation of *FAR 91.9*. They further have informed us that in the future, they will take enforcement action against any pilot they believe did so.

Thus, the taxiing rule is enforceable against Southwest pilots despite any failure of publication of the rule in the *Federal Register*.

[3] We are not persuaded, however, that publication in the *Federal Register* was obligatory. The APA directs publication only of "substantive rules of general ap-

plicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D). The *Lawson* case taxiing rule is not a statement of general policy but, rather, is an expression of a specific application of the policy announced in section 91.9. As such, publication of the taxiing rule under section 552(a)(1)(D) was not mandated.

[4] Tearney's next claim is that the FAA's failure to publish or promulgate its certificate-sanction policy violates the APA. He argues that the FAA is not empowered to authorize certificate actions as a sanction for a safety vilation. We disagree. The Federal Aviation Act provides specific authority for suspension of air man certificates. Title 49 U.S.C. App. § 1429(a) (1982) states in part:

> the Administrator [Secretary of Transportation] may issue an order amending,

> modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate.1

Moreover, in *Komjathy v. NTSB*, 832 F.2d 1294, 1296 (D.C. Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2825, 100 L.Ed.2d 926 (1988), our D.C. Circuit colleagues held that:

> There is a clear statutory basis for the FAA's policy of suspending airman certificates as a sanction for violation of FARs. The Federal Aviation Act provides the Administrator of the FAA broad discretion to suspend airman certificates upon a determination that the safety and public interest so require. 49 App.U.S.C. § 1429(a). It is settled that the authority may be used for the purpose of suspending an airman certificate as a disciplinary sanction for violation of FARs. *See, e.g., Go Leasing, Inc., v. NTSB*, 800 F.2d 1514, 1519-21 (9th Cir. 1986); *Pangburn v. Civil Aeronautics Board*, 311 F.2d 349, 354-56 (1st Cir. 1962).

Given the express power granted by the Federal Aviation Act and the controlling precedents, Tearney's contention that the

FAA cannot suspend his certificate under section 1429(a) must be rejected.

[5,6] Tearney's final claim is that the "public interest" standard, under which the FAA has the authority to suspend an airman's certificate, is unconstitutionally vague. We find no merit in this contention. Title 49 U.S.C.App. § 1429(a) provides that an airman's certificate may be suspended upon a determination "that safety in air commerce or air transportation and the public interest requires" such suspension. The statute also states that the NTSB "may amend, modify or reverse the Secretary of Transportation's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Secretary of TRansportation's order." *Id.* This public interest standard, governing both the FAA and NTSB, has been held by our Ninth Circuit colleagues to be synonymous with public safe-

ty. *Holmes v. Helms*, 705 F.2d 343 (9th Cir. 1983). We agree. We also agree "that a 'public safety' standard [is] sufficiently definite to satisfy due process." *Reid v. Engen*, 765 F.2d 1457, 1463 (9th Cir. 1985) (citing *Holmes v. Helms*). The challenged rule and action by the FAA pass constitutional muster.

THE PETITION FOR REVIEW IS DENIED.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit
No. 88-4558

BARNEY TEARNEY Filed May 12, 1989
Petitioner

versus

NATIONAL TRANSPORTATION SAFETY BOARD; and T. ALLAN MCARTOR, Administrator, Federal Aviation Administration,
Respondents.

Petition for Review of An Order of the National Transportation Safety Board

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion 4-4-89)

BEFORE: POLITZ, KING AND SMITH, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

CONSTITUTION
Article 1

Section I. **All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.**

CIVIL AERONAUTICS ACT OF 1938, ch. 601, § 609, 52 Stat. 973, 1011

Reads in part:

The Authority [CAA Administrator] may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may re-examine any airman, and after investigation, and upon notice and hearing, may alter, amend, modify, or [the Board may] suspend, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the

public so requires, or [the Board] may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Authority [Administrator] in refusing to issue the holder of such certificate a like certificate.

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5 U.S.C. § 551(4) (1982)

For the purpose of this subchapter --

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include --

* * * *

* * * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements

of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

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5 U.S.C. § 552(a)(1) (1982)

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the

public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms there of, a person may not in any manner be re-

quired to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

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5 U.S.C. § 553 (1982)

Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved --

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule

making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include --

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply --

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules

issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except --

(1) a substantive rule which grants or

recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

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5 U.S.C. § 558 (1982)

Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

* * * *

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5 U.S.C. § 706 (1982)

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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49 U.S.C. app. § 1348 (1982)

(a) The [Administrator] is authorized and directed to develop plans for and formulate policy with respect to use of the navigable airspace; and assign by rule, regulation, or order the use of the navig-

able airspace under such terms, conditions and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

* * * *

(c) The [Administrator] is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

(d) In the exercise of the rulemaking authority under subsections (a) and (c) of

this section, the [Administrator] shall be subject to the provisions of the Administrative Procedure Act, notwithstanding any exception relating to military or naval functions in section 4 thereof.

* * * *

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49 U.S.C. app. § 1421 (1982)

(a) The [Administrator] is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

* * * *

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedures, as the [Administrator] may find necessary

to provide adequately for national security and safety in air commerce.

* * * *

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49 U.S.C. app. § 1429(a) (1982)

Reinspection or reexamination; amendment, suspension, or revocation of certification

(a) procedure; notification; hearing; appeal to National Transportation Safety Board; judicial review

The Secretary of Transportation [Administrator] may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Secretary of Transportation [Administrator], he determines that safety in air commerce or air transportation and the public interest requires, the Secretary of Transportation [Administrator] may issue an order amending, modifying, suspending,

or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Secretary of Transportation [Administrator] shall advise the holder thereof as to any charges or other reasons relied upon by the Secretary of Transportation [Administrator] for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Secretary of Transportation [Administrator] under this section may appeal the

Secretary of Transportation's [Administrator's] order to the National Transportation Safety Board and the National Transportation Safety Board may, after notice and hearing, amend, modify, or reverse the Secretary of Transportation's [Administrator's] order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Secretary of Transportation's [Administrator's] order. In the conduct of its hearings the National Transportation Safety Board shall not be bound by findings of fact of the Secretary of Transportation [Administrator]. The filing of an appeal with the National Transportation Safety Board shall stay the effectiveness of the Secretary of Transportation's [Administrator's] order unless the Secretary of Transportation [Administrator] advises the National Transportation Safety Board that an emergency exists and safety in air com-

merce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the National Transportation Safety Board shall finally dispose of the appeal within sixty days after being so advised by the Secretary of Transportation [Administrator]. The person substantially affected by the National Transportation Safety Board's order may obtain judicial review of said order under the provisions of section 1486 of this Appendix, and the Secretary of Transportation [Administrator] shall be made a party to such proceedings.

* * * *

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49 U.S.C. app. § 1471 (1982)

Civil penalties; notice and hearing; compromise; liens

(a)(1) Any person who violates (A) any provision of subchapter III, IV, V, VI, VII, or XII of this chapter * * * or any

rule, regulation, or order issued thereunder, * * * shall be subject to a civil penalty of not to exceed $1,000 for each such violation, * * * If such violation is a continuing one, each day of such violation shall constitute a separate offense. * * *

(2) Any civil penalty may be compromised by the Secretary of Transportation [Administrator] in the case of violations of subchapters III, V, VI, or XII of this chapter, or any rule, regulation, or order issued thereunder, * * *

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49 U.S.C. app. § 1473(b)(1) (1982)

Venue and prosecution of offenses; procedures in respect of civil and aircraft piracy penalties

(b) Procedure in respect of civil penalties

(1) Any civil penalty imposed or assessed under this chapter may be collected by proceedings in personam against the person subject to the penalty and, in case

the penalty is a lien, by proceedings in rem against the aircraft, or by either method alone. Such proceedings shall conform as nearly as may be to civil suits in admiralty, except that with respect to proceedings involving penalties other than those assessed by the Board, either party may demand trial by jury of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be reexamined other than in accordance with the rules of the common law. The fact that in a libel in rem the seizure is made at a place not upon the high seas or navigable waters of the United States shall not be held in any way to limit the requirement of the conformity of the proceedings to civil suits in rem in admiralty.

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49 U.S.C. app. § 1903 (1982)
General provisions
Duties of the Board

(a) The Board shall --

* * * *

(9) review on appeal (A) the suspension, amendment, modification, revocation, or denial of any operating certificate or license issued by the [Administrator] under sections 1422, 1429, or 1431(c) of this title and the revocation of any certificate of registration u;nder section 1401(e)(2) of this title; * * *

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14 C.F.R. § 13.19 (1988)

Certificate action.

(a) Under section 609 of the Federal Aviation Act of 1958 (49 U.S.C. 1429), the Administrator may reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, and may re-examine any civil airman. Under section 501(e) of the FA Act, any Certificate of Aircraft Registration may be suspended or revoked by the Administrator for any cause that renders the

aircraft ineligible for registration.

(b) If, as a result of such a reinspection, re-examination, or other investigation made by the Administrator under section 609 of the FA Act, the Administrator determines that the public interest and safety in air commerce requires it, the Administrator may issue an order amending, suspending, or revoking, all or part of any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. This authority may be exercised for remedial purposes in cases involving the Hazardous Materials Transportation Act (49 U.S.C. 1801 et seq.) or regulations issued under that Act. This authority is also exercised by the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Regional Counsel concerned. If the Administrator

finds that any aircraft registered under Part 47 of this chapter is ineligible for registration or if the holder of a Certificate of Aircraft Registration has refused or failed to submit AC Form 8050-73, as required by § 47.51 of this chapter, the Administrator issues an order suspending or revoking that certificate. This authority as to aircraft found ineligible for registration is also exercised by the Aeronautical Center Counsel.

(c) Before issuing an order under paragraph (b) of this section, the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel (as to matters under Title V of the FA Act) advises the certificate holder of the charges or other reasons upon which the Administrator bases the proposed action and, except in an emergency, allows the holder to answer any charges and to be

heard as to why the certificate should not be amended, suspended, or revoked. The holder may, by checking the appropriate box on the form that is sent to the holder with the notice of proposed certificate action, elect to --

(1) Admit the charges and surrender his or her certificate;

(2) Answer the charges in writing;

(3) Request that an order be issued in accordance with the notice of proposed certificate action so that the certificate holder may appeal to the National Transportation Safety Board, if the charges concerning a matter under Title VI of the FA Act;

(4) Request an opportunity to be heard in an informal conference with the FAA counsel; or

(5) Request a hearing in accordance with Subpart D of this part if the charges concern a matter under Title V of the FA Act.

Except as provided in § 13.35(b), unless the certificate holder returns the form and, where required, an answer or motion, with a postmark of not later than 15 days after the date of receipt of the notice, the order of the Administrator is issued as proposed. If the certificate holder has requested an informal conference with the FAA counsel and the charges concern a matter under Title V of the FA Act, the holder may after that conference also request a formal hearing in writing with a postmark of not later than 10 days after the close of the conference. After considering any information submitted by the certificate holder, the Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Regional Counsel concerned, or the Aeronautical Center Counsel (as to matters under Title V of the FA Act) issues the order of the Administrator, except that if the holder has made a valid request for

a formal hearing on a matter under Title V of the FA Act initially or after an informal conference, Subpart D of this part governs further proceedings.

(d) Any person whose certificate is affected by an order issued under this section may appeal to the National Transportation Safety Board. If the certificate holder files an appeal with the Board, the Administrator's order is stayed unless the Administrator advises the Board that an emergency exists and safety in air commerce requires that the order become effective immediately. If the Board is so advised, the order remains effective and the Board shall finally dispose of the appeal within 60 days after the date of the advice. This paragraph does not apply to any person whose Certificate of Aircraft Registration is affected by an order issued under this section.

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14 CFR § 91.9 (1988)

Careless or reckless operation

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

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14 CFR § 121.311 (1988)

Seats, safety belts, and shoulder harnesses

(a) No person may operate an airplane unless there are available during the takeoff, en route flight, and landing--

(1) An approved seat or berth for each person on board the airplane who has reached his second birthday; and

(2) An approved safety belt for each person on board the airplane who has reached his second birthday, except that two persons occupying a berth may share one approved safety belt and two persons occupying a multiple lounge or divan seat may share one approved safety belt during en route flight only.

(b) During the takeoff and landing of an airplane, each person on board shall occupy an approved seat or berth with a separate safety belt properly secured about him. However, a person who has not reached his second birthday may be held by an adult who is occupying a seat or berth. A safety belt provided for the occupant of a seat may not be used during takeoff and landing by more than one person who has reached his second birthday. * * *

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14 CFR § 121.542 (1988)

Flight crewmember duties

(a) No certificate holder shall require, nor may any flight crewmember perform, any duties during a critical phase of flight except those duties required for the safe operation of the aircraft. Duties such as company required calls made for such non-safety related purposes as ordering galley supplies and confirming passenger connec-

tions, announcments made to passengers promoting the air carrier or pointing out sights of interest, and filling out company payroll and related records are not required for the safe operation of the aircraft.

(b) No flight crewmember may engage in, nor may any pilot in command permit, any activity during a critical phase of flight which could distract any flight crewmember from the performance of his or her duties or which could interfere in any way with the proper conduct of those duties. Activities such as eating meals, engaging in nonessential conversations within the cockpit and nonessential communications between the cabin and cockpit crews, and reading publications not related to the proper conduct of the flight are not required for the safe operation of the aircraft.

(c) For the purposes of this section, critical phases of flight includes all

ground operations involving taxi, takeoff and landing, and all other flight operations conducted below 10,000 feet, except cruise flight.

NOTE: Taxi is defined as "movement of an airplane under its own power on the surface of an airport."

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14 CFR § 121.589 (198)

Carry-on baggage

(a) * * * *

(b) No certificate holder may allow all passenger entry doors of an airplane to be closed in preparation for taxi or pushback unless at least one required crewmember has verified that each article of baggage is stowed in accordance with this section and § 121.285(c) of this part.

(c) No certificate holder may allow an airplane to take off or land unless each article of baggage is stowed:

(1) In a suitable closet or baggage or

cargo stowage compartment placarded for its maximum weight and providing proper restraint for all baggage or cargo stowed within, and in a manner that does not hinder the possible use of any emergency equipment; or

* * * * [etc., etc.]

Dept. of Commerce, Air Commerce Regulations (1926)

Sec. 74. Suspension or revocation of licenses. (Emphasis added)

Pilot's and mechanic's licenses will be suspended or revoked for--

(A) Violating any provision of the air commerce act of 1926 or these regulations.

(B) Carelessness or inattention to duty.

(C) Unsound physical condition or any demonstration of incompetency in the operation or repair of aircraft.

(D) Being under the influence, or using, or have personal possession of intoxicating liquor, cocaine, or other habit-forming drugs while on duty.

(E) Refusal to exhibit license upon proper demand.

(F) Violating air traffic rules.

* * * *

CHAPTER 5
AIR TRAFFIC RULES

* * * *

Sec. 79. Unlawful acts.

"It shall be unlawful * * * to navigate any aircraft otherwise than in conformity with the air traffic rules." (Sec. 11 (a)-(5).

Sec. 80. Penalty.

"Any person who violates any provision of subdivision (a) of this section * * * shall be subject to a civil penalty of $500." (Sec. 11 (b).)

* * * *

Civil Air Regulations

14 C.F.R. § 20.371 (1938)

20.371--GENERAL GROUNDS.--A pilot certificate of competency may be suspended or

revoked by reason of any of the following on the part of the holder thereof:

* * * *

20.37110--(*k*) Violation of any provision of the Air Commerce Act or any rule or regulation duly issued thereunder.

Compliance and Enforcement Program, FAA Order 2150.3 (1980) (Reprinted Oct. 1983)

[emphasis added; FAR references--all 14 C.F.R.--are added to contrast with the fact that no FAR speaks to certificate penalties but there is a rule for everything else].

203. ENFORCEMENT PROGRAM. The objectives of the enforcement program as set forth in Order 1000.9C, Enforcement Policy, are achieved through surveillance and detection, investigation, and enforcement processing.

. . . .

[p.12]

. . . .

c. Enforcement Processing. When violations occur, firm action must be taken. A

vigorous enforcement policy is necessary to achieve compliance with the regulations and we must forcefully respond to violations. Firmness should be balanced with fairness.

(1) Policy. Compliance with the regulations is promoted through both administrative and formal legal actions. Administrative actions (warning letters or letters of correction [FAR § 13.11]) are utilized to check potentially unsafe practices in situations where formal actions are unnec- essary or inappropriate. Formal legal actions are undertaken to:

(a) Enjoin conduct, before the act, which would violate the regulation (e.g., cease and desist orders [FAR § 13.20], injunctions [FAR § 13.25], aircraft seizures [FAR § 13.17]);

(b) Impose punitive sanctions, after the act, to deter violations (e.g., certificate actions [no FAR for such sanctions], civil penalties [FAR § 13.15]);

(c) Achieve remedial purposes (e.g., certificate suspension pending demonstration of qualifications; revocation for lack of certificate qualifications [FAR § 13.19-]).

(2) Judgement in Selecting Appropriate Action. It is difficult, solely by order, to establish guidelines which will correctly categorize all regulatory infractions so as to pin point the appropriate enforcement action. The ultimate decision must be the product of judgement and experience applied to the facts and circumstances of the individual case. Inspectors and field office chiefs must continue to exercise good judgement in handling first offense violations which meet the criteria for

[p.13]

administrative action and can be so handled with dispatch. If, however, the violation does not fit that criteria or there is deceit or incompetence involved, take stro-

ng action. **Use the maximum sanctions appropriate. If monetary sanction against any certificate holder is insufficient to get and keep their attention, do not hesi- tate to use certificate action**. Enforcement and investigative personnel can expect that their diligent efforts will be given full support at all levels of the FAA.

(3) National Uniformity. Each region must make every effort to achieve uniformity of enforcement action. **Similar violations under similar circumstances should result in the same type of enforcement action and sanction**. . . .

204. ADMINISTRATIVE ACTION . . .

205. DETERMINING THE TYPE OF LEGAL ENFORCEMENT ACTION. It is the inspector's responsibility to initially recommend the appropriate enforcement action. All involved elements of the FAA are then responsible for evaluating the seriousness of a violation, defining its impact on safety,

and judging the necessary action to obtain compliance. It is the intent of the following guidelines to assure greater national uniformity in enforcement actions.

a. Civil penalty.

(1) Civil penalty action is normally used as the sanction in cases where the violator does not hold any current certificate, in cases where the violator holds a certificate but no question of qualification is involved, or where the facts or circumstances are too serious to handle by administrative type enforcement action. Civil penalties may also be used in lieu of

[p.14]

certificate action where suspension is not necessary to obtain immediate corrective action. For example, where a major air carrier is involved in a maintenance violation and has taken satisfactory corrective action, a substantial civil penalty will serve as an appropriate deterrent without disrup-

ting essential air service to the public. **Civil penalties also may be initiated in any case where normally a suspension would be manifestly unfair or create an undue hardship and is not required for aviation safety.** However, when there is a serious ongoing safety violation involved, and immediate corrective action cannot be obtained, certificate action should be considered not withstanding hardship to the certificate holder or disruption of public service.

(2) Civil penalty action will not normally be used as an additional sanction to certificate action. **It should not be used as a substitute for certificate or restraining action when competence, attitude, or other circumstances are such that the same or similar violation is likely to occur.**

b. Certificate action - suspension.

(1) **Suspension action should be considered in all cases where safety requires it. For example, it should be utilized**

against an aircraft component manufacturer involved in serious quality control violations, whose product must be prevented from entering into service until adequate corrective actions are completed.

(2) It should be used in all cases where technical proficiency or qualification warrants, as in the case of an unqualified mechanic.

(3) Suspension action is warranted in situations where a certificate holder resists reexamination or reinspection under Section 609 of the Federal Aviation Act, or the reexamination or reinspection is not satisfactorily accomplished within a reasonable length of time (see Chapter 8).

(4) Suspension may be used for punitive purposes where the nature of the violation warrants it, except in cases where over six months have elapsed since the date of alleged violation. (See 49 CFR 821.33, NTSB Rules of Practice). The withdrawal of

. the privileges of certificate is a natural, equitable, and just consequence of the abuse of such privileges.

. . . .

[p.15]

EXHIBIT A

U.S. Department of Transportation
Federal Aviation Administration
Southwest Region
P.O. Box 1689
4400 Blue Mound Road
Fort Worth, Texas 76101

May 18, 1987

Case No. 87SW330144

CERTIFIED - RETURN RECEIPT REQUESTED

To: Mr. Barney Joseph Tearney
9422 Whisper Point
San Antonio, TX 75240

EMERGENCY ORDER OF REVOCATION

The Administrator of the Federal Aviation Administration (FAA) has received a report of investigation showing the following:

1. You hold Airman Certificate No. 5278-02838 with airline transport pilot privileges and various ratings.

2. On January 22, 1987, you served as pilot in command of civil aircraft N26SW, a Boeing Model 737-200, being operated as Southwest Airlines Flight 662, in scheduled air transportation from Dallas-Love Field, Texas to Will Rogers World Airport, Oklahoma City, Oklahoma.

3. You taxied the aircraft from the terminal prepatory for takeoff at Dallas-Love Field at a high rate of speed when a number of passengers were standing in the aisle of the passenger cabin.

4. You began the takeoff roll for departure before all flight attendants aboard the flight were able to seat and secure themselves in their seats.

5. In taxiing the aircraft when passengers were standing, and starting the take-off roll for departure before flight attendants were able to seat and secure themselves, you operated the aircraft in a careless manner so as to endanger the lives

or property of others on this flight.

6. The FAA was first informed of the foregoing facts and circumstances by a passenger written complaint dated January 24, 1987, misdirected to the Transportation Safety Institute (TSI), a copy of which was received by an FAA inspector on February 12, 1987. The investigation was closed for failure to locate the complaining witness and reopened when the details were confirmed in witness interviews conduct April 20, 1987 and on April 23, 1987.

By reason of the foregoing, you violated Section 91.9 of the Federal Aviation Regulations by operating an aircraft in a careless manner so as to endanger the life or property of another.

In determining the appropriate action to take in this case, the FAA has also considered the following:

a. By Order dated July 9, 1986, (Attachment A), you were charged by the Ad-

ministrator with violating Section 91.9 of the Federal Aviation Regulations by taxiing Southwest Airlines Flight 360 - New Orleans to Dallas - while passengers were standing in the aisle of the passenger cabin.

b. Following a hearing, you were found by NTSB Administrative Law Judge Reilly to have violated the regulations by this conduct. See Attachment B, Initial Decision.

Your above-described actions demonstrate a knowing disregard of the Federal Aviation Regulations as an airline pilot while serving as pilot in command of an aircraft in air transportation. Furthmore you have demonstrated that you are unwilling or unable to comply with the requirements of the Federal Aviation Regulations and that you will continue to repeat this pattern of unsafe conduct. [First alleged violation, November 11, 1985; here, January 22, 1987] The Administrator has, therefore, determined that you do not possess the care,

judgment and responsibility required to hold the airline transport pilot privileges of your airman certificate and that safety in air transportation and the public interest require the revocation of your airline transport pilot privileges.

Further, the Administrator has determined that an emergency exists and that safety in air transportation and the public interest require the immediate effectiveness of this Order.

NOW, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by Section 609 and 1005(a) of the Federal Aviation Act of 1958, as amended, that:

(1) The airline transport pilot privileges of your Airman Certificate No. 52780-2838, be and they hereby are revokedl

(2) Said revocation shall become effective immediately;

(3) Said certificate shall be surrendered immediately by mail or delivered to the

Regional Counsel of the Federal Aviation Administration, 4400 Blue Mound Road, Forth Worth, Texas 76193, and upon surrender, you are entitled to be issued a Commercial Pilot Certificate with appropriate ratings.

/s/
HAYS V. HETTINGER
Regional Counsel

cc: Fred Zimring, Esq.
Southwest Airlines

EXHIBIT B

U.S. Department of Transportation
Federal Aviation Administration
Southwest Region
P.O. Box 1689
4400 Blue Mound Road
Fort Worth, Texas 76101

May 21, 1987

Case No. 87SW330144

CERTIFIED - RETURN RECEIPT REQUESTED

To: Mr. Barney Joseph Tearney
9422 Whisper Point
San Antonio, TX 75240

WITHDRAWAL OF EMERGENCY ORDER OF REVOCATION

Whereas, by Emergency Order of Revocation served May 18, 1987, the Administra-

tor, Federal Aviation Administration, acting by and through his Regional Counsel, Southwest Region, revoked the Airline Transport Pilot privileges of your airman pilot certificate.

Whereas, the Emergency Order of Revocation was predicated on a finding that you violated Section 91.9 of the Federal Aviation Regulations by taxiing a Southwest Airlines Boeing B-737-200 airplane, prepatory to takeoff of a flight in air transportation, with passengers standing.

Whereas, you had previously been found by the Administrator to have violated Section 91.9 of the Federal Aviation Regulations as a result of your taxiing an airplane with passengers standing prepatory for takeoff of a flight in air transportation.

Whereas, in light of the foregoing, the Administrator had reason to believe you may engage in similar violations of the Federal Aviation Regulations in the future and,

therefore, determined that an emergency existed and that safety in air transportation and the public interest required the immediate effectiveness of the Order of Revocation.

Whereas, the Administrator has found that Southwest Airlines has taken immediate steps to implement a revised Southwest Airlines policy which prohibits this conduct [emphasis added] and that, therefore, the likelihood of future similar violations of the Federal Aviation Regulations by you has been greatly diminished and that an emergency no longer exists.

NOW, THEREFORE, The Emergency Order of Revocation dated May 18, 1987, is hereby withdrawn nunc pro tunc to the date of issue and the Notice of Proposed Certificate Action, appended hereto is substituted therefor.

/s/
John C. Curry
Acting Regional Counsel
cc: Southwest Airlines

EXHIBIT C

U.S. Department of Transportation
Federal Aviation Administration
Southwest Region
P.O. Box 1689
4400 Blue Mound Road
Fort Worth, Texas 76101

May 21, 1987

Case No. 87SW330144

CERTIFIED - RETURN RECEIPT REQUESTED

To: Barney Joseph Tearney
9422 Whisper Point
San Antonio, TX 75240

NOTICE OF PROPOSED CERTIFICATE ACTION

Take notice that upon consideration of a report of investigation, it appears that you violated the Federal Aviation Act of 1958, as amended, or regulations issued thereunder by reason of the following:

1. You hold Airman Certificate No. 5278-02838 with airline transport pilot privileges and various ratings.

2. On January 22, 1987, you served as pilot in command of civil aircraft N26SW, a Boeing Model 737-200, being operated as

Southwest Airlines Flight 662, in scheduled air transportation from Dallas-Love Field, Texas to Will Rogers World Airport, Oklahoma City, Oklahoma.

3. You taxied the aircraft from the terminal prepatory for takeoff at Dallas-Love Field at a high rate of speed when a number of passengers were standing in the aisle of the passenger cabin.

4. You began the takeoff roll for departure before all flight attendants aboard the flight were able to seat and secure themselves in their seats.

5. In taxiing the aircraft when passengers were standing, and starting the takeoff roll for departure before flight attendants were able to seat and secure themselves, you operated the aircraft in a careless manner so as to endanger the lives or property of others on this flight.

By reason of the foregoing, you violated Section 91.9 of the Federal Aviation Regul-

ations by operating an aircraft in a careless manner so as to endanger the life or property of another.

In determining the appropriate action to take in this case, the FAA has also considered that this violation appears to have been a knowing disregard of the Federal Aviation Regulations by reason of the following:

a. By Order dated July 9, 1986, (Attachment A), you were charged by the Administrator with violating Section 91.9 of the Federal Aviation Regulations by taxiing Southwest Airlines Flight 360 - New Orleans to Dallas - while passengers were standing in the aisle of the passenger cabin.

b. Following a hearing, you were found by NTSB Administrative Law Judge Reilly to have violated the regulations by this conduct. See Attachment B, Initial Decision.

By reason of the foregoing violations you are alleged to have committed and pur-

suant to the authority vested in the Administrator of the Federal Aviation Administration by Section 609 of the Federal Aviation Act of 1958, as amended, we propose to suspend your airman certificate with all privileges and ratings for a period of 180 days.

An Order for such suspension will be issued unless, within fifteen (15) days after service of this letter to you, you elect to proceed in accordance with the enclosed information with respect to the proposed certificate action.

/s/
JOHN C. CURRY
Acting Regional Counsel

Enclosures
cc: Southwest Airlines

EXHIBIT D

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
P.O. Box 61020-Parkway Plaza
Air Carrier District Office 33
Dallas/Fort Worth Airport, TX 75261

January 12, 1983

Mr. Herbert D. Kelleher
President, Southwest Airlines Co.
P.O. Box 37611
Dallas, Texas 75235

Dear Mr. Kelleher:

We are concerned about the safety aspects with Southwest Airline's passenger handling when taxiing from the gate to the runway. It has been the company's common practice to allow passengers to stand in the aisle stowing baggage or locating seats. This practice is not in concert with good safety procedures nor is it in concert with your very specific procedures to be followed after landing and taxiing to the gate.

Your duty is to conduct your service with the highest possible degree of safety.

Federal Aviation Regulations require that during taxi flight attendants must remain at their duty stations, except to perform duties related to the safety of the airplane and its occupants. Also, passengers are to remain in their seats with the seat belts fastened when the fasten seat belt sign is illuminated. Your procedures must not aid and abet noncompliance with these safety dictates.

We recognize that other modes of transportation allow passengers to be out of their seats while the vehicle is moving. There is also a tendency to justify a position based on past history. Your primary concern, however, is not to jeopardize the safety with which you are entrusted. For an air carrier to do so constitutes operation in a careless manner.

I trust you will adhere to the spirit of the law set forth in the FAA Act and adjust your operations accordingly so that all

passengers are seated prior to the aircraft departing the gate.

Sincerely,

/s/
Walter B. Molloy
Principal Operations Inspector

(Note: This letter is Deposition Exhibit 1, acquired from Southwest Airlines during discovery procedures in Adm'r v. Tearney, NTSB Docket SE-8797 (Tearney II), the case arising out of the emergency and suspension orders set forth immediately above. This case was later dismissed for lack of evidence after deposing the complaining witness.)

EXHIBIT E

U.S. Department of Transportation
Federal Aviation Administration
Office of the Administrator
800 Independence Ave, S.W.
Washington, D.C. 20591

March 22, 1985

Mr. Herb Kelleher
Chairman of the Board and
Chief Executive Officer
Southwest Airlines Company
Dallas, Texas 75235

Dear Mr. Kelleher:

During my first year with the Federal Aviation Administration, I have seen change taking place in the air transportation industry; this change has involved the redirection of airline marketing efforts and our safety surveillance activities. I appreciate the airline industry's efforts to continue to meet the safety challenges of the industry.

It came as a surprise to me when I learned that the Southwest Region found it necessary to resort to legal enforcement action in an effort to gain your airline's compliance on a bread-and-butter safety issue--that issue being the hazard associated with pushback and taxiing of aircraft while passengers are standing in the aisle. Even more surprising is the fact that, as I understand it, this is a recognized factor in your airline's basic marke-

ting strategy.

Please review your stand on this issue. We cannot condone such unsafe taxiing practices as are alleged to be occurring on your airline. Please call me if you have any questions.

Sincerely,

/s/
Donald D. Engen
Administrator

(Note: This letter is Exhibit A-5 (TR-322), introduced by the FAA in Adm'r v. Lawson, NTSB Docket SE-7071, referred to in *Tearney v. NTSB*, 868 F.2d 1451, 1454 (5th Cir. 1989), and is the precedent on which the Board relies in the instant case; it was was referred to in the Board's Opinion and Order in *Lawson*, EA-2419, Oct. 22, 1986, at 5; and is Deposition Exhibit 9 in Tearney II., *supra*.)

EXHIBIT F

SOUTHWEST AIRLINES CO.
P.O. Box 37611
Love Field
Dallas, Texas 75235
214/353-6110

Herbert D. Kelleher
Chairman of the Board
& President

April 22, 1985

Mr. Donald D. Engen
US Department of Transportation
800 Independence Ave., S.W.
Washington, D.C. 20591

Dear Mr. Administrator:

This is in response to your letter of March 22, 1985 concerning our practice of taxiing from the terminal with passengers standing in the aisle of our aircraft.

This practice has been followed by Southwest Airlines since we commenced flight operations on June 18, 1971. It was repeatedly approved by our various FAA Principal Operations inspectors over the next thirteen years. During that period of time, we boarded over 56,000,000 passengers with not a single incident or injury involving a

standing passenger.

In 1984, after thirteen years of FAA approval and carriage of over 56,000,000 passengers without incident, we were suddenly told that our taxiing with standing passengers was unsafe and would have to be discontinued. We initially declined to accept this conclusion for the following reasons:

1. Our own safety record, which refutes the allegation of hazard.

2. The lack of any proferred studies or even factual occurences to justify the reversal of thirteen years of FAA approval.

3. The fact that other airlines were permitted to taxi with standing passengers and did so.

4. The fact that no other airline, insofar as we could ascertain, had been compelled to modify its operations manual to prohibit taxiing with standing passengers.

If you examine our record with respect

to safety, you will find it superb. In addition, we have nothing but respect for the leadership and personnel of the FAA in the Southwest Region and have always cooperated to the fullest extent in the maintenance of safety. The direction given us concerning taxiing, however, appeared, right or wrongly, to be somewhat arbitary and, even worse, discriminatory.

Now that Mr. Faberman of your office has informed us that the ban on taxiing with passengers standing will apply nationwide and uniformly to all carriers, we have agreed with the Southwest Region to discontinue the practice, and I believe that the matter is now behind us.

Although not a part of our "marketing strategy" in the sense that it was something advertised or otherwise used to attract passengers, our taxiing policy was an important part of our aircraft utilization strategy, which produces lower fares thro-

ugh more efficient use of aircraft, and the abandonment of it will be very costly to us.

Best regards,

/s/
Herbert D. Kelleher

(Note: Although this letter is an integral part of the story begun by FAA Exhibit A-5 in Lawson, *supra*, they did not introduce it; it is Deposition Exhibit 8 in Tearney II., *supra*.)

EXHIBIT G

U.S. Department of Transportation
Federal Aviation Administration
Office of the Administrator
800 Independence Ave, S.W.
Washington, D.C. 20591

June 3, 1985

Mr. Herb Kelleher
Chairman of the Board and
President
Southwest Airlines Co.
P.O. Box 37611
Dallas, Texas 75235

Dear Mr. Kelleher:

I appreciate your prompt response to my

letter of March 22 concerning taxiing with passengers standing in the aisle of the aircraft. That response is consistent with Southwest's past record. I am sure we share a commitment to ensure that air carrier operations are conducted with the highest degree of safety. In that respect the Federal Aviation Regulations clearly require that each passenger be securely in his or her seat prior to aircraft movement.

I can assure you that I am taking all appropriate measures to standardize agency action. The Southwest Region's position on not allowing passengers to stand while the aircraft is taxiing is consistent with the position taken with other carriers.

Sincerely,

/s/
Donald D. Engen
Administrator

(Note: Same comment as with Exhibit F.)

EXHIBIT H

SOUTHWEST

TO: ALL PILOTS
FROM: Capt. Jim Amos
DATE: April 8, 1985
SUBJECT: **TAXIING WITH PASSENGERS STANDING**

The FAA has informed us that they are taking the position that taxiing while passengers are standing in the aisles is a per se violation of FAR 91.9. They further have informed us that in the future they will take enforcement action against any pilot they believe did so.

Our counsel tells us it is his opinion that while there are some circumstances under which taxiing with passengers not seated may constitute a violation of FAR 91.9 (e.g. fast taxiing, sudden braking, incidents involving people or luggage falling, injuries, etc.), "normal" situations would not.

However, in order to avoid the possibility of an incident or violation, we

ask that our pilots take reasonable steps to assure themselves that all passengers are seated prior to the aircraft taxiing under its own power.

/s/ Jim Amos

cc: Herb Kelleher
Bill Miller
Gary Barron

(Note: This was Exhibit A-4 (TR-322) in Lawson, *supra*, introduced by the FAA, also referred to in the Board's Opinion and Order, *supra*, at 5; and is Deposition Exhibit 11 in Tearney (II), *supra*.

EXHIBIT I

U.S. Department of Transportation
Federal Aviation Administration
Southwest Region
P.O. Box 1689
4400 Blue Mound Road
Fort Worth, Texas 76101

April 8, 1985

Fred Zimring, Esq.
Zimring & Warner, P.C.
Empire Plaza 1
1430 Empire Central, Suite 470
Dallas, TX 75240

Re: Administrator v. Jon E. Coleman
NTSB Docket No. SE-6537, Gerald A. Hall,

FAA Case No. 84SW330126, John R. Billington, Jr., FAA Case No. 84SW330127 (and other taxiing with passengers standing incidents involving Southwest Airlines pilots)

Dear Mr. Zimring:

This is to acknowledge receipt of Southwest Airline's letter of April 8, 1985 to Mr. Melugin, Director, FAA Southwest Regional Office, regarding taxiing with passengers standing.

Consistent with the agreement reached at the meeting of Ed Faberman [FAA Deputy Chief Counsel or Assistant to the Administrator], Joseph Kovarik, Garry Barron [SWA general counsel], Don Bachman [SW Region lawyer] and yourself on April 3, 1985, FAA, upon being made aware that a copy of the notice attached to the letter to Mr. Melugin has been circulated to the Southwest Pilots, will withdraw all the above enforcement actions and will not take any enforcement action against any Southwest Airlines pilot who taxied aircraft

with passengers standing prior to receipt of Southwest Airline's instructions not to taxi when such conditions exist.

Sincerely,

/s/
Joseph A. Kovarik
Regional Counsel

(Note: Although evidently not an exhibit in Lawson, *supra*, the agreement was mentioned by FAA counsel during a discourse with the law judge, which was referred to in the Board's Opinion and Order, *supra*, at 3; and is Deposition Exhibit 5 in Tearney (II), *supra*.

EXHIBIT J

ACTION NOTICE A 8430.6
U.S.Department of Transportation
Federal Aviation Administration

Subject: Passenger Seating During Ground Operations
Approval Date: October 31, 1986

From: Director of Flight Standards
Expiration Date: October 1, 1987

To: All regional and Aeronautical Center Directors, Director, Europe,

Africa, and Middle East Office
Attention: Flight Standards Division Managers; Superintendent, FAA Academy, AAC-900; Manager, Flight Standards Staff, AEU-200; All GADO's, ACDO's and FSDO's.

We understand that some certificate holders have operated with passengers standing in the aisle while the aircraft is moving on the surface and/or may not have procedures which ensure that passengers are seated and properly restrained during surface operations. When passengers are standing for any reason (e.g., attempting to stow luggage) during aircraft surface movement, the likelihood of their being injured may be increased should there be a sudden stop or change in aircraft direction.

In addition, passengers standing in an aisle or doorway could interfere with a crewmember trying to reach and/or open an exit or perform some other emergency duty. Evacuation duties and procedures are based on evacuation demonstrations which are

initiated with all passengers seated with their seatbelts fastened at the start of the demonstration.

Principal operations inspectors are requested to review their assigned certificate holder's procedures to ensure the following:

1. Illumination of the seatbelt sign is part of the cockpit checklist and appears at an appropriate point to ensure its illumination prior to any movement of the aircraft either by pushback, powerback, or taxi. It should not be illuminated during passenger boarding but rather should serve as a signal that movement of the aircraft is imminent.

2. Cabin crewmembers monitor passenger compliance with the seatbelt sign and inform the cockpit when passengers are not in compliance. This would include passengers being seated during pushback, powerback, taxi, and any other time the seatbelt sign

is illuminated during flight or on the surface.

NOTE: THE CONTENTS OF THIS ACTION NOTICE, IF APPROPRIATE, SHALL BE INCORPORATED INTO THE DIRECTIVES SYSTEM WITHIN SIX MONTHS AFTER THE DATE OF APPROVAL.

(Note: this notice is dated months after the Lawson hearing, so was not referred to; nor, to our knowledge, was it in any later hearing; it is Deposition Exhibit 20 in Tearney II.)

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